Supreme Court of the United States,

OCTOBER TERM, 1919.

No. 566.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

AGAINST

CHARLES D. NEWTON, as Attorney General for the State of New York, EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendants (not appealing),

THE CITY OF NEW YORK,
Appellant.

MEMORANDUM FOR COMPLAINANT, IN OPPOSITION TO MOTION TO ADVANCE.

Motion by the City of New York to advance the argument of an appeal (taken in September, 1919) from an order of the Circuit Court of Appeals,

Second Circuit, unanimously affirming an order of the District Court which denied the application of the City for leave to intervene.

On October 6, 1919, the City applied to this Court for a writ of *certiorari* to review the said order from which the said appeal had previously been taken. The application was denied by this Court on October 20, 1919.

The suit was brought by the complainant, the Consolidated Gas Company of New York, to have the so-called Eighty-cent Act (L. 1906, Ch. 125), which limits the price of gas to be charged to private consumers in the City of New York to eighty cents per thousand cubic feet, declared void, on the ground that the rate is confiscatory and therefore deprives the complainant of its property without due process of law.

POINTS.

FIRST.

The public interest already completely represented and protected.

All parties charged with the duty of upholding the Eighty-cent Act (L. 1906, Ch. 125), which is attacked in this litigation, are already before the Court: the Public Service Commission, the Attorney General and the District Attorney of New York County.

I. As pointed out in our brief submitted on October 6, 1919, in opposition to the application herein of the City of New York for a writ of *certiorari*, there are two Public Service Commissions in the State of New York: one for the First District, comprising the City of New York, and the other for the remainder of the State. Absolute power of regulation and enforcement of the law is conferred upon the Commission (L. 1907, Ch. 429, as amended; see Appendix, *post*, p. 13).

The Commission is, therefore, the sole body charged with the duty of representing the consumers in the City of New York.

In re Engelhard, 231 U. S. 646.

II. The Attorney General is required by law to appear in all cases involving the constitutionality of an act of the legislature; and the Eighty-cent Act is assailed on the ground that it is unconstitutional.

Executive Law, Sec. 68 (Appendix, *post*, p. 14).

III. The District Attorney of the County in which a suit is triable is charged with the duty of enforcing the penalties prescribed by the statute.

Code Civ. Pro., Sec. 1962 (Appendix, *post*, p. 15).

IV. All of the said officials are parties defendant herein and have taken an active part in the defense of this suit (*post*, p. 11).

SECOND.

The City already represented in the litigation.

After the District Court had denied the application of the City to intervene, the Corporation Counsel of the City, in his official capacity, was substituted as solicitor for Mr. Swann, the District Attorney. A motion by the complainant to set aside the order of substitution was denied, on the ground asserted by the City, that the Corporation Counsel had undoubted power to appear for the District Attorney. Extracts from the affidavit of the Corporation Counsel, claiming this right, are given in the annexed affidavit of Mr. Vilas (*post*, pp. 9-10); which also shows that since then, the City, through its Corporation Counsel, has been continuously active in taking a prominent part in the defense, not only in the cross-examination of the complainant's witnesses, but also in employing accountants, engineers and expert witnesses of its own. The question of the right of the City to intervene has, therefore,

become academic; and the suggestion made to this Court, that the cause should be advanced so as to enable the City to take part in the litigation before its conclusion, is lacking in candor. This is all the more evident in the fact that the City took an appeal to this Court in September, and *thereafter* applied for a writ of *certiorari,* and that it has delayed making the present application to advance until almost the close of the trial. The hearings before the Special Master commenced in July, last, and have proceeded almost continuously since then. The complainant closed its case on December 23, 1919 (Moving Papers, p. 12). The defense has since then proceeded continuously; and it is expected that the trial will be concluded about the middle of February (*post,* p. 11).

THIRD.

Frivolous character of the application.

If the City was not a *necessary* party to this litigation, that is, if the order denying its application to intervene did not deprive it absolutely of a right which it could not otherwise protect, the order was not final and, therefore, is not appealable. The only pretense of such a right is that, under another statute (L. 1905, Ch. 736), the price of gas to the City is limited to seventy-five cents, and that if the Eighty-cent Act in favor of the private consumers should be declared void, the Seventy-five-cent Act *might* be attacked by the Company some time in the future and the City *might* be prejudiced in maintaining it!

I. The record on appeal expressly shows that the Company has no intention of attacking the Seventy-five-cent Act (Record, p. 18). Moreover, the validity of that Act was determined by this Court in the previous litigation, in which the City was made a party for the reason that the validity of that Act was then assailed.

Willcox *v.* Consolidated Gas Co., 212 U. S. 19.

A decision in the present case in favor of the Gas Company, which would enable it to establish a rate to its private consumers permitting an adequate return on its investment, would make it absolutely impossible for the Company, under the previous decision of this Court (212 U. S. 54), to question the seventy-five cent rate.

The contention of the City has not even the basis of the personal interest which might prompt any one of the 500,000 individual consumers of the Company (Record, p. 15) to intervene.

II. If the City was not a *necessary* party to the litigation (which is not pretended), then its application to intervene was within the discretion of the District Court; and its decision will not be reviewed by this Court, even if the lower Court treated the question as one of right and not of discretion.

Credits Commutation Co. *v.* U. S., 177 U. S. 311, 315.

III. The statement in the moving papers (p. 12), that other suits are pending, in which the City would like to intervene, further exposes the trivial character of the present motion. No attempt is made to state what the issues in those cases are,

nor who are the parties, nor whether the Seventy-five-cent Act is or could be attacked, nor whether the suits are of such a character that the court would be justified in exercising its discretion in favor of the application, and not even that the City has any right to intervene or any personal or public interest to protect.

FOURTH.

The application to advance should be denied.

Washington, January 26, 1920.

JOHN A. GARVER,
Counsel for appellee.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

No. 566.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

AGAINST

CHARLES D. NEWTON, as Attorney General for the State of New York, EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendants (not appealing),

THE CITY OF NEW YORK,
Appellant.

Affidavit of Ch
A. Vilas
in opposition
tition to adv

STATE OF NEW YORK, }
County of New York, } ss:

CHARLES A. VILAS, being duly sworn, says:

1. I am an attorney and counselor-at-law, associated with the firm of Shearman & Sterling, solicitors for the complainant herein; and I am familiar with all the proceedings which have been had in this suit. I have read the petition of the City of New York to advance this cause, dated January 12, 1920.

2. After the application of the City of New York for leave to intervene herein had been denied by the District Court, the Corporation Counsel of said City was substituted, as such, as solicitor for the defendant, Edward Swann, District Attorney for the County of New York. This substitution was effected by an order, dated May 15, 1919, two months before the trial of the suit was commenced before the Special Master. The complainant moved to vacate the substitution; but, upon the Corporation Counsel's affidavit that it was his duty, *as attorney and counsel for the City of New York,* to appear for the District Attorney, the motion was denied, on June 6, 1919; and the Corporation Counsel has ever since continued to act as solicitor for the defendant, Swann, in this suit.

3. In its petition on this motion, the City of New York, through its Corporation Counsel, alleges, in effect (p. 7), that the defendant, Swann, as District Attorney of the County of New York, has no substantial interest in this action and is really a necessary party only through a "statutory accident". It is, therefore, apparent that it did not cause its Corporation Counsel to be substituted as solicitor for the District Attorney merely for the purpose of protecting his interests in the litigation. The real purpose of the substitution was to permit the City, although held by the Court not to be a proper party, to defend the action as fully as if it were a party; and this is shown by the following extracts from the affidavit of the Corporation Counsel, filed in opposition to the complainant's motion to vacate the substitution:

> "Deponent alleges that the responsibility of defending said action and appearing in behalf of said District Attorney herein is within his

duty as attorney and counsel for The City of New York, its officers and agents, and the officers of the counties embraced in said City."

* * * * *

"That under the direction of your deponent, a large number of cases affecting the rates at which various public services are performed in The City of New York have been conducted by the office of the Corporation Counsel before the Public Service Commission of the First District and before the Supreme Court of the State of New York in the counties of Kings, Queens, New York and of the Bronx. Prominent among these cases are those affecting the rates of the Newtown Gas Company, the Woodhaven Gas Company, the Brooklyn Borough Gas Company, The Bronx Gas and Electric Company and the Kings County Lighting Company. That by reason of the connection of the said Corporation Counsel's office with these cases, deponent has trained a number of experts who are very proficient in this branch of litigation. The services of these men are available in the conduct of the case at bar without expense to the taxpayers other than the regular compensation of said City employees. That, moreover, the office of the Commissioner of Accounts, which is an office provided by the Greater New York Charter, is available to your deponent for the purpose of making investigations as to the accounts of the complainant and as to its operating expenses."

4. Since the first day of the trial of this suit, which commenced on July 22, 1919, and has since proceeded almost continuously, the record now comprising more than ten thousand (10,000) pages, exclusive of exhibits, the Corporation Counsel has been represented at every session by Mr. John P. O'Brien, one of the Assistant Corporation Counsel, who has appeared for the City in all recent rate

cases to which it has been a party. Mr. O'Brien has taken a very active and the most prominent part in the defense of the present suit, has cross-examined the witnesses for the complainant at great length and is now examining witnesses on behalf of the defense. The City has also employed accountants, engineers and expert statisticians, who have assisted the Corporation Counsel in connection with the defense, and who are now preparing to appear as witnesses. Mr. Terence Farley, the solicitor for the defendant, Lewis Nixon, constituting the Public Service Commission for the First District, and the defendant most vitally interested in the suit since he is the public officer who is charged by law with the duty of enforcing the provisions of the statute under attack, has consumed probably not more than one-third as much of the time of the Court as has Mr. O'Brien; and this is also true of the Attorney General.

5. The complainant rested its case on December 23, 1919; and the defendants have since been continuously engaged in presenting their defense; and the sessions have frequently occupied as much as six hours a day. In my judgment, it is probable that the trial will be completed about the middle of February.

6. The order of the Circuit Court of Appeals, affirming the order of the District Court denying the application of the City to intervene, was made on July 19, 1919.

The appeal to this Court from the said order was taken by the City of New York on September 23, 1919.

7. Annexed hereto, marked "Appendix", are correct extracts from the statutes of New York, show-

ing the powers conferred and the duties imposed upon the Public Service Commission, the Attorney General and the District Attorney, in cases of this kind.

The application for a writ of *certiorari* to review the said order was made to this Court on October 6, 1919, and was denied on October 20, 1919.

CHARLES A. VILAS

Sworn to before me,
January 22, 1920.

FREDERIC N. GILBERT
Notary Public, Westchester County
Certificate filed in New York County
New York County Clerk's No. 101.
New York Register's No. 1231

Appendix.

1. Extracts from Public Service Commission Law.

(L. 107, Chap. 429, as amended.)

Section 3. *Public service districts.*—There are hereby created two public service districts, to be known as the first district and the second district. The first district shall include the counties of New York, Bronx, Kings, Queens and Richmond. The second district shall include all other counties of the state.

Section 74. *Summary proceedings.*—Whenever either commission shall be of opinion that a gas corporation, electrical corporation or municipality within its jurisdiction is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the supreme court of the state of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the supreme court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the court to specify the time not exceeding twenty days after service of a copy of the petition within which the gas corporation, electrical corporation or municipality complained of must answer the petition. In case of default in answer or after answer, the court shall immediately inquire into the facts and circum-

stances in such manner as the court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations, as it shall seem to the court necessary or proper to join as parties in order to make its order, judgment or writs effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or both issue as prayed for in the petition or in such modified or other form as the court may determine will afford appropriate relief."

2. EXTRACT FROM EXECUTIVE LAW.

Section 68. *Attorney General to appear in cases involving the constitutionality of an act of the legislature.*—Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question to serve notice thereof on the attorney general and that the attorney general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney general to appear in such action or proceeding in support of the constitutionality of such statute.

3. EXTRACT FROM CODE OF CIVIL PROCEDURE.

Section 1962. *Action for forfeiture, etc.*— Where real or personal property has been forfeited, or a penalty incurred, to the people of the State, or to an officer for their use, pursuant to a provision of law, the attorney general, or the district attorney of the county in which the action is triable, must bring an action to recover the property or penalty, in a court having jurisdiction thereof. Where the supreme court and a justice's court have concurrent jurisdiction of the action, it may be brought in either, at the election of the attorner general or district attorney. A recovery in such an action bars a recovery in any other action brought for the same cause.

No. 566

IN THE

Supreme Court of the United States

October Term—1919

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,
against

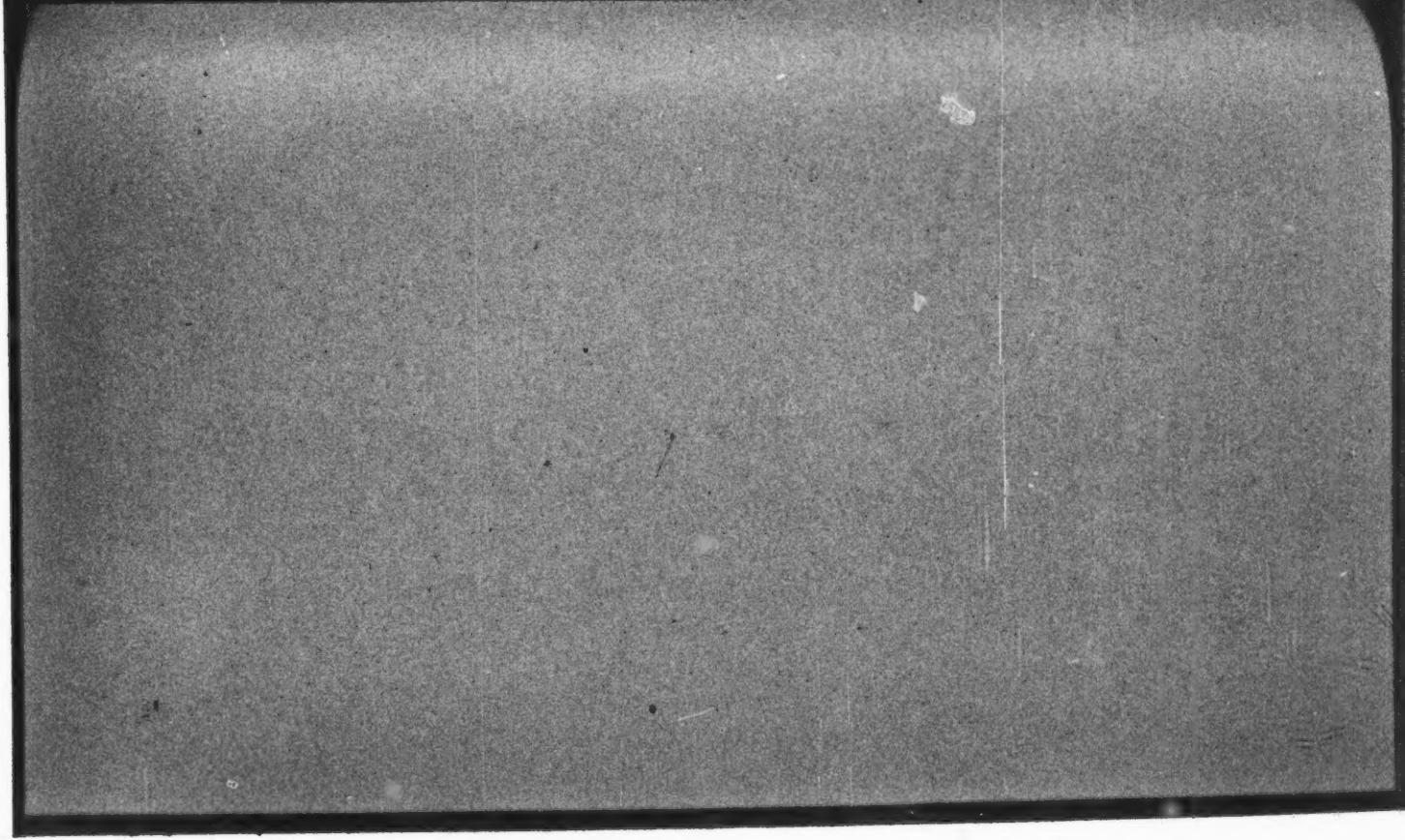
CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,
Defendants,

THE CITY OF NEW YORK,
Appellant.

Brief on Behalf of The City of New York

WILLIAM P. BURR,
Corporation Counsel and Solicitor for Appellant,
Municipal Building,
New York City.

Ingle, Inc., 165 William Street



SUBJECT INDEX TO BRIEF.

List of Cases.

List of Text Books.

Charters.

Rule.

Appendix.

IN THE

Supreme Court of the United States

October Term—1919.

CONSOLIDATED GAS COMPANY OF NEW YORK,
Complainant-Appellee,

against

CHARLES D. NEWTON, as Attorney General of the State of New York, EDWARD SWANN, as District Attorney of the County of New York, State of New York, and LEWIS NIXON, constituting the Public Service Commission of the State of New York, First District,

Defendants,

THE CITY OF NEW YORK,
Appellant.

BRIEF ON BEHALF OF THE CITY OF NEW YORK.

Statement.

This is an appeal to the Supreme Court to review an order of the Circuit Court of Appeals dated July 7, 1919, and filed and entered July 18, 1919, affirming an order of the District Court of the United States for the Southern District of New York, dated March 3, 1919, denying, as a matter of law, an application of The City of New York for leave to intervene as a party defendant in the above-entitled action commenced on January 16,

1919, in the said District Court of the United States for the Southern District of New York, and brought to have declared unconstitutional Chapter 125 of the Laws of the State of New York of 1906, providing a rate for gas sold to private consumers of 80 cents per one thousand cubic feet within the certain portions of The City of New York, because in contravention of the 14th Amendment of the Constitution of the United States and Section 10, Article I of the United States Constitution. A copy of Chapter 125 of the Laws of 1906 is annexed to this brief (see page 47).

The relief prayed for in the bill of complaint in this action specifically reads as follows:

> "1. That it be adjudged and decreed that said Chapter 125 of the Laws of 1906 is illegal and void, because in contravention of Section 10 of Article I and the Fourteenth Amendment of the Constitution of the United States, as aforesaid.
>
> 2. That it be adjudged and decreed that your orator has no adequate remedy at law for the injury which will result from the further enforcement of said Act and that such injury will be irreparable.
>
> 3. That it be adjudged and decreed that your orator be granted a writ of permanent injunction, issuing out of and under the seal of this Honorable Court, against the defendants, restraining them and each of them and each of their officers, agents, servants and employees and any and every person acting under and by virtue of the authority of said Act, from in any way enforcing or attempting to enforce the provisions of said Act of 1906 against your orator, or from bringing any actions thereunder to enforce the said penalties against your orator, or from bringing any actions in mandamus or for an injunction in any court whatsoever, for the purpose of compelling compliance by your orator with said Act."

Chapter 125 of the Laws of 1906, the constitutionality of which was questioned by this suit, related solely to the affairs and government of the City of New York and was *accepted by said City*, under the provisions of Article XII, Section 2, of the State Constitution.

A history of the Consolidated Gas Company of New York, taken from Poor's Manual of Public Utilities (1918, page 1417) is attached to this brief (see page 67).

The City of New York was not made a party to this suit.

The price of gas supplied to The City of New York was and now is fixed at 75 cents per thousand cubic feet by another act, which applies exclusively to The City of New York, to wit: Chapter 736 of the Laws of 1905. A copy of this act is annexed to this brief (see page 49).

Charles D. Newton, as Attorney General of the State of New York, was made a party and considered a party necessary to a complete determination of this cause for the reason that, by virtue of Section 1962 of the Code of Civil Procedure (a copy of which is annexed to this brief—see page 64), it is within the power and it is the duty of the Attorney General to set in motion proceedings for the recovery of the penalties prescribed by the said statute whenever an attempt is made to charge more than the letter of the statute permits, and, under Section 68 of the Executive Law, the Attorney General is the officer charged, under the procedure there set forth, with the duty of defending the constitutionality of statutes. For these reasons he is a necessary party-defendant, and the determination would not be complete without his presence.

Edward Swann, as District Attorney of the County of New York, was made a party for the reason that he is also an officer charged under said Section 1962 of the Code of Civil Procedure with the power and duty

of bringing an action to recover the penalties provided by said Chapter 125 of the Laws of 1906.

The provision of said Chapter 125 of the Laws of 1906 relating to *penalties* has been practically held unconstitutional by the Supreme Court of the United States. As to these penalties, Mr. Justice PECKHAM, delivering the opinion of the Supreme Court in *Consolidated Gas Company* v. *Wilcox, as Chairman, etc., and others* (212 U. S., 19), said, in part:

> "We are of the same opinion as to the penalties provided for a violation of the acts. They are not a necessary or inseparable part of the acts, without which they would not have been passed. If these provisions as to penalties have been properly construed by the court below, they are undoubtedly void within the principle decided in *ex parte Young* (209 U. S., 123, and the cases there cited), because so numerous and overwhelming in their amount."

It appears from an affidavit of said Edward Swann, filed in this suit with the Clerk of the District Court, that the office of the District Attorney of the County of New York is not equipped to undertake the defense of a suit of this character and that the office of the District Attorney of the County of New York is concerned primarily with the prosecution of criminal offenses, and it further appears that the District Attorney of the County of New York is a necessary defendant in the above-entitled suit largely because of what might be called a statutory accident. (See opinion herein of Judge JULIUS M. MAYER, transcript of record, page).

The defendant Lewis Nixon, constituting the Public Service Commission of the State of New York, First District, was made a party to this cause of action for

the reason that it is provided by Section 74 of the Public Service Commission Law (Chapter 429 of the Laws of 1907) (a copy of this section is annexed to this brief—see page 52, (that whenever the said Commission shall be of opinion that a gas company is failing or omitting to do anything required by law, or is doing anything contrary to or in violation of law, the said Commission shall direct their counsel to begin proceedings in the Supreme Court of the State of New York to have such action prevented by injunction or mandamus.

The Legislature passed in 1907 Chapter 429 of that year, which is entitled:

> "AN ACT to establish the public service commissions and prescribing their powers and duties, and to provide for the regulation and control of certain public service corporations and making an appropriation therefor."

Section 2 of Article XII of the Constitution of the State of New York above mentioned classifies cities, defines *general and special city laws*, and provides for the acceptance of laws relating to the *property affairs* and *government* of cities by the Mayors of such cities. A copy of said Section 2, Article XII, of the Constitution of the State of New York is attached to this brief (see page 50).

The Legislature passed in 1913 Chapter 247 of that year, known as the "*Home Rule Law.*" A copy of this law is attached to this brief (see page 53).

Also in the year 1913 the Legislature passed Chapter 442 of that year, amending the "Executive Law" by adding Section 68 thereto, upon which considerable reliance is placed by the complainant. A copy of said Chapter 442 of the Laws of 1913 is attached to this brief (see page 62).

The Consolidated Gas Company of New York, complainant in said suit, commenced another action on May 1, 1906, to have declared unconstitutional on the same grounds both said acts, namely, Chapter 125 of the Laws of 1906, and Chapter 736 of the Laws of 1905, *and to this suit The City of New York was made a party defendant* and defended the same and thereafter the Supreme Court in the year 1908, sustained said acts as constitutional and valid. The mandate from the Supreme Court of the United States in said suit, dated January 4, 1909, provided in part:

> "And it is further ordered that this cause be and the same is hereby remanded to the said Circuit Court with directions to dismiss the appeal without prejudice."

The decree, dated February 13, 1909, entered on said mandate, provided, in part, as follows:

> "FIRST: That the judgment of the United States Supreme Court be and the same hereby is made the judgment of this court, and that the decree of this court entered herein on the 3d day of April, 1908, in favor of complainant be reversed;
>
> SECOND: That the bill of complaint herein be and the same hereby is dismissed without prejudice, with the reservation aforesaid."

See

William R. Willcox, *et al.*, constituting the Public Service Commission of the State of New York for the First District, and others, Appellants,

against

Consolidated Gas Company of New York, 212 U. S., 19.

On January 29, 1919, the Corporation Counsel of The City of New York moved by petition and order to show cause before Hon. JULIUS M. MAYER, *District Judge,* for the Southern District of New York, for permission to intervene in said *second* action *so commenced January 16, 1919,* as a party defendant, which application was denied and an order was entered, dated March 3, 1919, reading, in part, as follows:

> "Order, adjudged and decree, that the said motion to intervene be and the same hereby is denied *as matter of law,* and the said petition of The City of New York be and the same hereby is dismissed, the court not passing on the matter as one of discretion, because not necessary at this time, but reserving the right so to do if in error as to the law."

The City of New York was allowed on May 29, 1919, an appeal from said order of March 3, 1919, to the Circuit Court of Appeals for the Second Circuit which confirmed said order.

The contentions of The City of New York are:

First: The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming the order of March 3, 1919, of the District Court of the United States for the Southern District of New York, for an order permitting it to intervene as a party defendant in this litigation and also in refusing to reverse said order of March 3, 1919, of the District Court of the United States for the Southern District of New York, filed and entered herein March 3, 1919.

Second: The Circuit Court of Appeals of the United States for the Second Circuit erred in coofirming said order of the District Court and in thereby holding that The City of New York in the previous litigation herein

was not regarded as a party defendant so far as Chapter 125 of the Laws of 1906 was concerned.

Third: The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming said order of the District Court of the United States for the Southern District of New York and in thereby holding that every officer or public body who or which is charged by law with a duty in respect of the defense of the 80-cent gas statute of this law suit has been made a party defendant.

Fourth: The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming said order of the District Court of the United States for the Southern District of New York and in thereby holding that The City of New York is not a proper party defendant within the meaning of Equity Rule 37.

Fifth: The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming said order of the District Court of the United States for the Southern District of New York and in thereby holding that The City of New York is not a necessary party within the meaning of Equity Rule 37 and to this litigation.

Sixth: The Circuit Court of Appeals of the United States for the Second Circuit erred in confirming said order of the District Court of the United States for the Southern District of New York and in thereby holding that the City of New York is not interested in this litigation within the meaning of said Equity Rule 37.

In support of these contentions, The City of New York respectfully urges the following

POINTS

I.

Interested, as it is, in upholding the validity of a special city law, which was passed, at its request, for the benefit of its inhabitants, and representing, as it does, its taxpayers, many of whom are the respondent company's consumers, The City of New York is vitally interested in the result of this litigation.

(1) The status of The City of New York.

If The City of New York be compelled, by the constitutional provisions, a copy of which we have attached to this brief, to grant or withhold its acceptance of any City bill, which refers particularly to it, how can it be claimed, with any show of reason, that it is not interested in defending such a bill and establishing its validity? What greater interest has the Attorney General or the District Attorney of the County of New York than The City of New York in upholding such legislation? To quote the language of Judge POUND in

Matter of International Ry. Co. v. *Rann*, 224 N. Y., 83, 89:

> "The substantial rights (of the municipality) are the rights of the inhabitants of the city, not of the civil division of the state which exists for governmental and public purposes. A municipal corporation consists, however, of both territory and inhabitants. As a legal conception, the corporation is an entity distinct from its inhabitants, but it remains a local community; a body of persons; the sum total of its inhabitants and *the proper custodian and guardian of their collective rights.*"

Chapter 125 of the Laws of 1906, is a special City law relating to the "*property, affairs or government*" of The City of New York within the meaning of Article XII, Section 2 of the Constitution of the State of New York, and for this reason it would *not have been valid* if it were not accepted by The City of New York and for the very reason it is endorsed "*accepted by the City of New York.*" Then does it not follow that the city is both a necessary and proper party in an action brought to have this Act declared invalid.

The rate of gas is a matter of municipal interest.

Mr. Justice RODENBECK, sitting in the Monroe County Special Term of the Supreme Court, in June, 1916, had before him a question whether a limitation of street railroad fares to five cents was "germane to the governmental powers and function of a city." (See *Willis against City of Rochester*, 95 Misc., 686, affirmed in 219 N. Y., 427.) This case involved the constitutionality of a local act of the Legislature of the State of New York which amended the charter of the City of Rochester so as to bring certain adjacent territory within the city limits and provided that a corporation operating a street surface railroad shall not charge any passenger more than five cents for a continuous ride within the limits of the city as thus enlarged. An attack was made upon this act, on the ground that the inclusion of such a limitation on fares in the city charter violated the constitutional provisions against the joining of matters of general legislation with provisions of private and local bills. The honorable Court said that

> "the answer to this question depends upon whether or not the regulation of street railroads, and particularly the *fixing of fares* to be charged, comes

within the subjects which *properly are or may be made a matter of municipal regulation or control.* Is the *regulation* of street railroads *so far as the city is concerned* 'a matter which may be required for the preservation of peace, good order and health within its limits, the promotion of its growth and prosperity and the raising of revenue for its government'? (*Louisiana* v. *Pilsbury,* 105 U. S., 278-289). If their regulation comes within any of these purposes, *provisions relating to fares* may be included in an act creating a city or one amending its charter generally. It seems to me that upon principle and upon the adjudicated cases the question must be answered in the affirmative." (Italics are ours.)

Citing:

Public Service Comm. v. *Westchester Street Railway Co.,* 206 N. Y., 209;
Willcox v. *Richmond Light and R. R. Co.,* 142 App. Div., 44, aff'd 202 N. Y., 515, and other cases.

His conclusion was that the legislative power had not been exceeded because exercised in a local act confined to matters relating to the city, the establishment of maximum fares on railroads within the City being a municipal purpose.

Only one Judge dissented from the affirmance of this case in the Court of Appeals. The opinion of the Court, per POUND, *J.*, held that "*The rate of fare is a matter of municipal and public interest.*"

In *Willis* v. *City of Rochester* (*supra*), Judge RODENBECK further said:

"The regulation of the conduct of street railroads, with such general limitations as may be imposed, are as much a *municipal purpose* and the

> *subject of municipal regulation and control* as are such matters as the supply of water, the lighting of streets, the disposal of sewage and garbage and the *numerous other matters which affect the peace, health, comfort or convenience of the members of the corporation.* The regulation of a railroad in a city may affect very seriously, not only the *convenience of the inhabitants* but the *growth and development of the city,* and *is, therefore, a matter of grave municipal concern,* particularly since the construction of a railroad in a street or highway acts substantially as a monopoly of the right to use that street or highway for such purposes." (Italics are ours.)

The same principle would apply to the regulation of the rate of the Consolidated Gas Company, by Chapter 125 of the Laws of 1906, which is, in the words of Judge RODENBECK, "*a matter of grave municipal concern to the City of New York.*"

In *Public Service Commission* v. *Westchester Street Railway Company* (206 N. Y., 209), where the municipality had made the observance of a 5-cent fare a condition of its consent and the company later tried nevertheless to charge more, the Court of Appeals said:

> "There is no doubt that the *rate of fare* to be charged to and from points in the village was a matter of such *municipal* and *public interest* that the municipal authorities might bargain with reference thereto."

In *Sun Printing and Publishing Association, et al., appellants, against the Mayor, Aldermen and Commonalty of the City of New York, the Board of Rapid Transit Railroad Commissioners, in and for the City of New York, et al., respondents,* decided March 23, 1897 (152 N. Y., 257), the Court of Appeals had before it the question

whether Chapter 4 of the Laws of 1891, as emended providing for the construction by the City of a rapid transit route, was constitutional, and the immediate question for the Court to decide was whether the construction of such a rapid transit route by the City was a *"City purpose."* This question was decided by the Court of Appeals in the affirmative in an elaborate opinion, in which Judge HAIGHT said:

> *"They are necessary for the common welfare of the people, required for their use, public in character and authorized by the Legislature, and when constructed and owned by the City are for a 'city purpose' within the meaning of the Constitution."*

Judge HAIGHT, in his opinion, cites many cases, among them, *People* v. *Kelly*, 76 N. Y., 475, where it was held that the construction of a bridge joining the City of Brooklyn and the City of New York was a *"city purpose."* In this case, Judge EARL (pp. 487-489) said:

> "On the contrary it would be a 'city purpose' to purchase a supply of water outside of a city, and convey it into the city, and for such a purpose a city debt could be created. So lands for a park for the health and comfort of the inhabitants of a city could be purchased outside of a city limits, and yet conveniently near thereto. *Such improvements are for the common and general benefit of all the citizens, and have always been regarded as within the scope of municipal government;* and so to highways or streets leading into a city or village may be improved, provided the improvements be confined within such limits that they may be regarded as for the *common benefit and enjoyment of all the citizens."*

In *Matter of Application of Mayor*, 99 N. Y., 569, Judge FINCH had before him the question whether the

construction of Pelham Park by the City was a "city purpose." Among other things, he said (see p. 585):

> "The purpose must be primarily the *benefit or convenience of the City as distinguished from that of the public outside of it,* although they may be incidentally benefited, and the work be of such a character as to show plainly a predominance of that purpose. And then the thing to be done must be within the ordinary range of municipal action."

It was held in *Olmstead* v. *Proprietors,* 47 N. J. Law, 311, and *Scudder* v. *Trenton Falls Co.,* 1 N. J. Equity, 694, that a city in supplying its citizens with gas and water did not lose its distinctive municipal character.

It is, therefore, clear from the above authorities that the rate chargeable for gas to the inhabitants of a city is a matter of great municipal concern, *a "municipal purpose,"* and that the City of New York is a necessary and proper party to any suit brought to invalidate an act such as Chapter 125 of the Laws of 1906, fixing the rate of gas at 80 cents per thousand cubic feet for its inhabitants.

The rate of gas would be equally a municipal interest.

All of those public matters, which concern the people of the State at large, in common with the people of a particular locality, such as the administration of justice and the authority of the State generally, through and by legislative enactments adminsitered by State officers, or by virtue of the power of the Central Government, in the preservation of the public peace and affairs of like general character, although some of which may be in the hands of local or municipal authorities, are matters of State or central jurisdiction. On the other hand, all of those public affairs, which concern the inhabitants of the locality, as an organized community, apart from the

people of the State at large, as supplying purely local needs, conveniences and comforts, like water, light, or gas, the establishment of sewers, fire protection, the enforcement of by-laws or ordinances touching the interests of the local corporation alone, are essential matters of local concern.

McQuillan Mun. Corporations, Vol. 1, Sec. 173.

The fundamental idea of a municipal corporation is based on the fact that it is an artificial personality or a governmental organ created to regulate and administer the internal or local concerns of the district embraced within its corporate limits in matters peculiar to such place and not common to the State at large. It is manifest, therefore, that it is not, from the standpoint of State interest, but from that of local interest, that the necessity of the creation and continued existence of cities, towns and villages most distinctly appears.

See

Herbert v. *Benson*, 2 La. Ann., 770;
Police Jury of Bossier v. *Shreveport*, 5 La. Ann., 661.

Such a corporation acts for all the inhabitants residing within its boundaries, in supplying municipal needs, conveniences and comforts through officers in most instances chosen by the qualified electors, either directly by an election or indirectly by appointment of the local au thorities, and who act not by themselves but as trustees, administering the trust committed to their charge for the benefit of the corporation as a whole.

McQuillan Mun. Corps., Vol. 1, Sec. 87.

And the inhabitants residing within the corporate limits, or those entitled to vote at municipal elections, are the members of the corporation. Residence within the pace or district and qualifications as a municipal elector, constitute membership in the corporation, and it is not affected by the wishes of the person or the corporation.

> "In all quasi corporations, as cities, towns, parishes and school districts, membership is constituted by living within certain limits."
>
> *Overseers of the Poor* v. *Sears*, 22 Pick. (Mass.), 122, 130;

approved by GREY, *C. J.*, in

> *Hill* v. *City of Boston*, 122 Mass., 344, 356; 23 Amer. Rep., 332.

It has also been well said that

> "When a man removes into a town, he becomes a citizen thereof, whatever may be the desire of himself or the town. His removal into the town is voluntary. But having removed, it is not optional with himself or the town, whether he shall become a citizen thereof or not."
>
> *Oakes* v. *Hill*, 10 Pick. (Mass.), 333, 346.

And there is no doubt that a judgment against the municipality binds its citizens and taxpayers.

> *Ashton* v. *City of Rochester*, 133 N. Y., 187.

Appreciating, as we do, the close and intimate relationship between the citizens of a municipality and the municipality itself, so far as representing them in matters of this kind is concerned, let us examine the claims advanced by the complainant that the Attorney General and the District Attorney and the Public Service Com-

mission are more directly interested in the result of this litigation than either The City of New York or its citizens.

(2) The status of the Attorney General.

According to the complainant, the only reason why the Attorney General was made a party was because, by reason of the existence of Section 68 of the Executive Law, he is required to defend the constitutionality of the statute in question. But, is that true of this particular statute? So far as we are aware, this particular question has never arisen. Undoubtedly it is the duty of the Attorney General to defend all those statutes of the State in which all the people of the State are interested. But, is he obliged to justify a purely local statute, a special law which is applicable only to a particular city? We think not. Let us assume that one of the provisions of our City Charter were assailed, would any one seriously contend that any obligation rested upon the Attorney General to intervene and defend it? Again, we say no.

If the 80-cent gas law requires the shield and protection of the Attorney General, so did the 75-cent statute which was involved in the prior litigation. And why was it that the complainant then called upon the City to advocate its legality? The Supreme Court, in that case, sanctioned the practice which we are now seeking to compel the Company to follow. It established that procedure and should be forced to live up to it.

But let us assume that it is the Attorney General's statutory duty to defend this enactment, what is the nature of his obligation? Simply to endeavor to sustain the constitutionality of this legislation from a *purely legal point of view. He is not interested in its economic aspects;* he has no concern with the viewpoints of the

consumers. *He would be justified in maintaining that, if the proofs of the complaint justified its contention, his duty ended and that no obligation rested upon him to controvert them.* But there is something more than a mere legal point of view in a suit of this character. The consumer, who pays his money for the gas, and the Company which supplies it, and the *City whose streets are used* and who likewise uses the gas, *are the persons who are directly and financially interested* in a litigation of this character. The Attorney General can lose nothing. Nor can the State suffer any loss. *But an adverse decision will mean a loss of millions to the City and the consumers.* Why should they not have a direct representative instead of being compelled to appear by a state official who has little more than a perfunctory duty to perform, and whose task may be limited to filing a brief, on the law point involved, as *amicus curiae* and not as the attorney for the thousands of consumers who are the complainant's customers.

(3) The status of the Public Service Commission.

The Public Service Commission is a peculiarly constituted body. Strictly speaking, the law does not constitute it the defender of the constitutionality of this statute. Its functions are not only of a legislative but also of a quasi-judicial character and its viewpoint is constantly found to be different from that of the municipality and the consumers. To illustrate: In the *Municipal Gas Company* case (224 N. Y., 156), decided July 12, 1918, which involved the question of the power of the Public Service Commission to raise a rate above the statutory limit, the Public Service Commission contended that it had the power to regulate the price of gas to fix the maximum, in a case where the statute, fixing the maximum, was confiscatory and unconstitutional. That

body has constantly taken this position. And we find this Commission in June, 1919, asserting in the Appellate Division, Second Department, in the *Brooklyn Borough Gas Company* case, that the statute prescribing a $1 maximum rate for the Brooklyn Borough Company was no longer in existence; whereas the contention of The City of New York, representing the consumers, was that that statute was still in force.

Again, the Public Service Commission, sitting in a quasi-judicial or legislative capacity, with respect to hearing complaints, investigating charges and regulating rates, *has frequently fixed rates, which it is apparently unwilling or unable to change.* Such decisions are incorporated in carefully annotated reports. They are frequently cited as adjudications of that body and, in actual practice, *that body feels more or less bound by the decisions which it renders. Thus, when matters of appraisals or valuations come up, the Commission feels that it is limited and restricted by the findings made by the same body at some earlier period.* For this reason, the Commission and its staff are constantly placed in the position of defending its previous rulings and findings and these findings and rulings are frequently controverted by the consumers. It is clear, therefore, under the law which created it and under the rulings which it has made from time to time, that that body cannot be expected to be, in the first instance, the protector of the rights of the consumer. The very nature of its duties bar it from becoming the advocate of a consumer as against a gas company.

(4) As to the interest of The City of New York personally.

It is true that, in the former suit, the validity of Chapter 736 of the Laws of 1905, as well as 125 of the Laws of 1906, were both involved.

Chapter 736 of the Laws of 1905 fixed the rate for gas supplied to The City of New York at 75 cents per 1,000 cubic feet. In the litigation referred to in paragraph VI of the bill of complaint herein and entitled "*Wilcox* v. *Consolidated Gas Co. of New York, et al.*," the validity of this act was sustained by the Supreme Court of the United States. (See 212 U. S., 19, 54.) The United States Supreme Court in that case said:

> "Lastly, it is objected that there is an illegal discrimination as between the City and the consumers individually. We see no discrimination which is illegal or for which good reasons could not be given. But neither the City nor the consumers are finding any fault with it, and the only interest of the complainant in the question is to find out whether by the reduced price to the City the complainant is upon the whole unable to realize a return sufficient to comply with what it has the right to demand. What we have already said applies to the facts now in question.
>
> We cannot see from the whole evidence that the *price fixed for gas supplied to the City by the wholesale*, so to speak, *would so reduce the profits from the total of the gas supplied as to thereby render such total profits insufficient as a return upon the property used by the complainant.* So long as the total is enough to furnish such return it is not important that with relation to some customers that price is not enough."

In the said litigation entitled "*Wilcox* v. *Consolidated Gas Company of New York, et al.*," the complain-

ant herein made a special attack on said Chapter 736 of the Laws of 1905 on the ground that the same was unduly preferential and discriminatory against the general consumers of gas in The City of New York.

And it is likewise true that, in that litigation, The City of New York, through its Corporation Counsel, made an attack upon the franchises of some of the consolidated companies which formed the present complainant and he claimed that the complainant had no right to lay mains and pipes in some of the streets o ..is City. That question was not decided. It is still open and may be decided in the present suit. It is of great importance because, if the complainant has no right to use our streets, and it is, for that reason a trespasser, it is surely in no position to urge, in an equity suit, that the rates which the Legislature has fixed are confiscatory. We are unable tc perceive that either the Attorney General or the Public Service Commission are particularly interested in the solution of this problem. It is one of purely municipal concern.

There is another phase of this question which must not be overlooked. The mere fact that the complainant asserts that it will not, in this suit, question the 75-cent rate, eliminate the interest of the City. One of the issues necessarily involved in this litigation is the cost of producing and distributing gas. If the 80-cent rate be confiscatory, it may be that it is so because the Company is obliged to supply gas to the City for 75 cents. The elements which constitute the two rates are so closely interwoven that it is impossible to separate them and to say which apply to the 75, and which to the 80-cent rate. The result of this trial will be the making of findings of fact as to the cost of manufacturing and distributing gas. If it be determined that the 80-cent rate, charged to consumers generally, is insufficient and that it

denies to the Company a fair return upon its investment, such a finding will undoubtedly influence not only legislation, but it will also jeopardize the interests of the City in any litigation which may be brought to challenge the constitutionality of the 75-cent rate. Whatever may be said to the contrary, it cannot fail to have that effect. Is it not better, therefore, for all concerned, that the City should be allowed to intervent in this suit so that all of the questions involved may be finally and conclusively settled?

Foster, Federal Practice (5th ed.), Vol. 1, Secs. 110, 116, 120, 128.

The City of New York, therefore, is a necessary and proper party to this litigation in order to protect itself against the claim of this company with regard to its franchise, and further to protect the special 75-cent rate granted it by Chapter 736 of the Laws of 1905. It, therefore, appears that The City of New York is a necessary and proper party defendant to the above-entitled suit and that it must, in order to protect said 75-cent rate, introduce evidence to show the special conditions under which gas is supplied to The City of New York and *prove that the complainant herein, the Consolidated Gas Company of New York, is not required to furnish gas to The City of New York without substantial remuneration and that the service of the complainant to the said City is no ground or basis for holding or contending that the existing rate to consumers is unconstitutional and confiscatory.*

II.

Under Equity Rule 37, The City of New York is a person who "claims an interest adverse to the plaintiff." Its presence "is necessary or proper to "a complete determination of the cause." And, claiming, as it does, "an interest in the litigation," it should "be permitted to assert his (its) rights by intervention."

Equity Rule XXXVII of the Supreme Court of the United States provides, in part, as follows:

> "* * * All persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs, and any person may be made a defendant who has or claims an interest adverse to the plaintiff. *Any person may at any time be made a party if his presence is necessary or proper to a complete determination of the cause.* Persons having a united interest must be joined on the same side as plaintiffs or defendants, but when any one refuses to join, he may for such reason be made a defendant.
>
> *Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention,* but the intervention shall be in subordination to, and in recognition of, the propriety of the same proceeding."

The City of New York, your petitioner herein, respectfully submits that a complete determination of the controversy arising out of the above-entitled litigation cannot be had without its presence as a party defendant and that it has an interest in the subject of said action which entitles it to an order permitting it to intervene in said litigation as a party defendant therein. The

City of New York is the largest consumer of the gas furnished by the plaintiff Company.

The City of New York, your petitioner, has no other means of protecting itself against any attack that may be made on the said 75-cent gas rate in said litigation than by and through intervention therein and that it could never obtain relief from a determination against the validity of said 75-cent statutory rate in said litigation unless it were permitted to intervene and protect itself therein.

(1) We are unaware of any cognate rule or statute which is as broad and comprehensive in its scope and meaning as Equity Rule 37. The City claims an interest adverse to the plaintiff. Complainant's interest in the legislation is to have these statutory gas rates declared confiscatory so that it may be able to increase them. The City and the consumer oppose that view. They assert that the rates are not confiscatory and that, if the rates be increased, they will suffer financial losses. Neither the Attorney General or the District Attorney or the Public Service Commission, as such, has any financial interest. What, then, is an "interest" within the meaning of the rule? Interests, generally speaking, are of two classes, legal and equitable, and these may be sub-divided into what have been termed pecuniary, proprietary and personal interests. We fail to appreciate, within the meaning of any of these expressions, that any of the defendants has any "interests" in this controversy. On the other hand, it was held by this Court, in

> *Delaware, Lackawanna & Western R. R. Co.* v. *Interstate Commerce Commission,* Circuit Court of Appeals, Second Circuit, 169 Fed. Rep., 894,

that individual shippers, who were pecuniarily interested in the rates which had been fixed by the Commission,

were entitled to protect those interests, by intervening in an equity suit, brought by a common carrier, to have the rates annulled. That is precisely the present situation. The consumers or their duly authorized representative, their statutory attorney in fact, The City of New York, for the reasons which we have enumerated, are vitally interested in having the present gas rates sustained. Who else is, who else can be, interested? So far as we can discern, there is no conflict between these views and those expressed by the Court.

In re Engelhard, 231 U. S., 646.

Engelhard invoked the original jurisdiction of the Supreme Court by applying for a writ of mandamus to compel a Judge of the District Court to vacate an order made by him, in a suit brought by the Cumberland Telephone and Telegraph Company against the City of Louisville, in so far as the order denied to Engelhard the right to sue on behalf of all subscribers of the Telephone and Telegraph Company, similarly situated with him, who had paid the Telephone and Telegraph Company, during the pendency of the injunction against a certain rate ordinance enacted by the City, sums in excess of the rates fixed in the ordinance. Engelhard, as such petitioner, further asked the Supreme Court to compel the District Court Judge, by mandamus, to enter an order permitting him to sue for and represent and act on behalf of such subscribers with respect to the restitution of the sums so collected. As the opinion of the Court, delivered by Mr. Justice McKenna, clearly shows, all that the Court held was that the District Court did not exceed its discretion in making the order under review (see 231 U. S., at page 651); and that the District Judge could not be compelled, by mandamus, to reverse himself (see p. 652).

The nature of the intervention, sought in the *Engelhard* case, was thus entirely different, both in respect to the individual capacity in which an intervention was sought and also in respect to the nature of the issues which the petitioner sought to litigate. Moreover, the application to intervene was made by Engelhard after the suit had been in progress for more than a year and a half. The present application to intervene was made at the very inception of the suit. It was made by the municipality which had actively participated in the former suit which was fought out ten years ago. In that prior litigation, The City of New York took the leading part in resisting, by proofs, the allegations of the complainant and in seeking to sustain, and succeeding in sustaining, the validity of this same statute against the claim then made that it was confiscatory. The constitutionality of that statute being again challenged on supplemental facts by this complainant, the City asks permission of this Court to intervene, not for the purpose of interjecting any foreign or subsidiary issues in the case, but simply and solely for the purpose of defending the statute against the alleged claim of the complainant that it is now confiscatory in its operation upon it.

Since complainant lays so much stress on *In re Engelhard*, Mr. Justice McKenna's opinion may be read with profit. Unless we are very much mistaken, this Court will find in it language and dicta which are very helpful and which lend support to the present application.

In

Northern Pac. Ry. Co. v. *Lee* (District Court, W. D. Washington, S. D.), 199 Fed., 621,

the Court held that in a suit by a railroad company against a state commission to enjoin the enforcement of freight rates established by it under a state statute, ship-

pers of articles affected by such rates may properly be joined as defendants as representatives of their class on an allegation that, unless enjoined, they will attempt to enforce such rates. Referring to the subject (at page 627), it was said:

> "Under the demurrers, the first ground urged is that there is a misjoinder of parties defendant, in that certain shippers are joined with the members of the state Commission and the state's Attorney General as defendants—it being alleged that they will, unless enjoined, seek to enforce the rates fixed by the Commission. They are sued as representatives of that class of shippers, shipping the commodities affected by the modified rates. Therefore they are proper, if not necessary, parties. Though not directly ruled upon, this course has been noticed with apparent approval by the Supreme Court in *Ex parte Young*, 209 U. S., 123, 28 Sup. Ct., 441, 52 L. Ed., 714, 13 L. R. A. (N. S.), 932, 14 Ann. Cas., 764. While it is true that, through the Commission and the state's Attorney General, the public is represented, though the state is not sued, yet the shippers joined as defendants are representatives of a class directly and particularly affected."

So long as the 80-cent Gas Law remains in force, there is lodged in The City of New York the power and right to compel obedience to its provisions, by any company violating the same, by a mandamus proceeding.

In

> *State ex rel. City of Bridgeton* v. *Bridgeton & M. Traction Co.*, 62 N. J. L., 592, 45 L. R. A., 837, 841,

LIPPINCOTT, *J.*, stated:

> "* * * that the city of Bridgeton, representing the public, *for whose benefit the ordinance was passed*, and the road constructed and oper-

ated, is a proper party as relator. This position seems to be clearly sustained by all the authorities. * * *"

See, also,

People ex rel. Lehmaier v. *Interurban Street Railway Co.*, 177 N. Y., 296, at p. 301;
Matter of International Ry. Co. v. *Rann*, 224 N. Y., 83;
Muncie Natural Gas Co. v. *Muncie*, 160 Ind., 109, 60 L. R. A., 829;
Charter of The City of New York, Sec. 255.

That section provides, in part, that

"The corporation counsel shall have charge and conduct of all the law business of the corporation and its departments and boards *and of all law business in which the city of New York is interested*, except as otherwise herein provided. * * * The corporation counsel, except as otherwise herein provided, shall have the right * * * to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or any part or portion thereof, *or of the people thereof*. * * *"

This is a very positive, clear and unmistakable declaration, by the Legislature, that any local laws, which are specially applicable to The City of New York, shall be enforced and sustained, not by the Attorney General or the Public Service Commission, but by The City of New York. But we go further and assert, in all confidence, if there be any conflict between Section 68 of the Executive Law, upon which the complainant relies, and the section of the Charter which we have quoted, that the general state law must yield to the special local law.

Schieffelin v. *McClellan*, 135 App. Div., 665, 669; affd. 197 N. Y., 610.

The authorities, interpreting the meaning of the word "necessary" or "proper" parties, are in such hopeless confusion that it is impossible to even attempt to reconcile them. The question as to who may or may not be necessary or proper parties is and always has been, in very many cases, a most difficult and perplexing one. It constitutes of itself a title in the law of equity jurisprudence upon which great learning has been expended, without the ascertainment of any rule of general or universal application. Each case must still be determined, to a considerable extent, upon its own peculiar facts and circumstances, the objects of all rules upon the subject being in accordance with the cherished principles in equity that the adjudication may be as complete and conclusive as possible. The rule to be gathered from all the authorities may in a few words be stated to be that in no case does the jurisdiction of the courts over the subject matter and parties properly before it depend, nor can it be made to depend, on the absence of other parties, however the right of other parties may be complicated by the decree, or however necessary it may be that they should be brought in, in order that a complete and final determination of the controversy may be had.

Board of Supervisors of Iowa County v. *Mineral Point R. Co.*, 24 Misc., 93, 132.

Can a complete and final determination of this controversy be had without the presence of the City? If the City be not made a party, any adjudication which may be made will not bind it and, if it be adverse to its interests of the interests of its people, it will be obliged to relitigate any determination which may be made. Giving the phrase, "a complete and final determination of the controversy," its broadest construction, it may be held to mean the entry of any judgment. That is a "final"

determination of that controversy so far as the persons who are before the court in that litigation are concerned; but that, we submit, is not the meaning of Equity Rule 31.

> "Persons whose interests will necessarily be affected by any decree that can be rendered, are necessary and indispensable parties" (15 Enc. Pl. and Prac., p. 612).
>
> "Necessary and indispensable parties include 'all persons who have an interest in the controversy of such a nature that the final decree cannot be made without either affecting their interests or leaving the controversy in such condition that its final determination may be wholly inconsistent with equity and good conscience' (*id.*, pp. 611, 612).
>
> "The term 'necessary parties' also includes persons who * * * are so connected with the subject matter of the controversy that it is necessary to have them before the court for the proper protection of those whom the decree will necessarily and directly affect" (*id.*, p. 614).
>
> *Chandler* v. *Ward,* 188 Ill., 322, 58 N. E., 919, 924.

Or, as it has been otherwise stated,

> "proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all the persons who have any interest in the subject matter of the litigation."
>
> *Tatum* v. *Roberts,* 59 Minn., 52, 60 N. W., 848, 849.

Numerous other cases expound similar views.

> "In actions in equity, so-called necessary parties are those without whom no decree can be

> effectively made. 'Proper' parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all persons who have any interest in the subject matter of the litigation. Pom. Rem. & Rem. Rights, Section 329."
>
> *Lumbermen's Ins. Co.* v. *City of St. Paul,* 77 Minn., 410, 80 N. W., 357, 358.

A broad and most important distinction must, therefore, be made between the two classes of parties defendant, namely, those who are "necessary" and those who are "proper."

> "Necessary parties, when the term is accurately used, are those without whom no decree can be effectively made determining the principal issues in the cause. Proper parties are those without whom a substantial decree may be made, but not a decree which shall completely settle all the questions which may be involved in the controversy, and conclude the rights of all persons who may have any interest in the subject matter of the litigation."
>
> *Rosina* v. *Trowbridge,* 20 Nev., 105, 17 Pac., 751, 755.

The rulings of the Federal Courts are in accord with these views. Thus, in

> *Sioux City Terminal Railroad & W. Co.* v. *Trust Co. of N. America* (Circuit Court of Appeals, Eighth Circuit), 82 Fed., 124, 126.

Circuit Judge SANBORN, after defining what constitutes an "indispensable" party, stated that

> "every other party who has an interest in the controversy or the subject matter which is separable from the interest of the parties before the Court, so that it will not be immediately affected by a decree which does complete justice between them, is a proper party."

A "proper party," it was held in

> *Kelly* v. *Boettcher* (Circuit Court of Appeals, Eighth Circuit), 85 Fed., 55, 64.

> "as distinguished from one whose presence is necessary to the determination of the controversy, is one who has an interest in the subject matter of the litigation, which may be conveniently settled therein."

See, also,

> *Donovan* v. *Campion* (Circuit Court of Appeals, Eighth Circuit), 85 Fed., 71, 72.

(3) As has been stated, the proposed intervention of the City is "in subordination to, and in recognition of the propriety of the main proceeding."

We recognize the propriety of a suit of this character. If these rates are confiscatory, undoubtedly a suit of this character is maintainable. We find no fault on that score. To repeat, our position is that it is impossible from either an equitable or legal point of view, to have a full, fair and complete adjudication of the issues involved without the presence of the City.

III.

The Circuit Court for the Northern District of California has clearly pointed out the inapplicability of the cases which the respondent company cited before the Court of Appeals to sustain the proposition that the municipality, in a suit like the present, does not represent the consumers,

> *San Francisco G. & El. Co.* v. *City and County of San Francisco* (Circuit Court, N. D. California), 164 Fed., 884, 887.

In the case cited, it was squarely held that a municipality sufficiently represents the gas consumers, who reside within its borders, as to justify, in a suit in which the former is made a party defendant, an injunction against the latter, although they are not formally joined. Referring to the rule that

> "where the parties concerned are so numerous as to make it practically impossible to bring them all before the court, but, the right being common to all, one or more being made parties are permitted to represent all, or where those who are impleaded stand, under the law, in a representative or trust relation to those who are not" (p. 886),

the Court (at p. 887), said:

> "This rule is peculiarly applicable to cases like the present. Here the real parties in interest are the ratepayers or consumers—the public. The ordinance fixing the rate is for the benefit of the latter, not for that of the supervisors or municipality alone. The supervisors are acting in a purely representative capacity. They stand for and represent, not only the municipality, but the entire community or body of consumers, and in this re-

spect they must be regarded as occupying the relation of trustees to the latter. As stated by Mr. Freeman in Section 178 of his work on Judgments:

> 'The position of a county or municipal corporation towards its citizens and taxpayers is, upon principle, analogous to that of a trustee towards his *cestuis que* trust, when they are numerous and the management and control of their interests are by the terms of the trust committed to his care. A judgment against a county or its legal representatives in a matter of general interest to all its citizens is binding upon the latter, though they are not parties to the suit.'

"Here the purpose of the action is not only to have the obnoxious regulation declared void as violative of complainant's constitutional rights, but to have the enforcement of that rate restrained pending the determination of its validity, that complainant may not suffer irreparable wrong in the meantime through the bringing by individual consumers of a multiplicity of actions to enforce it. It being practically impossible, indeed prohibitive, in such a case to make each individual ratepayer a party, the law is satisfied by joining with the rate-making body the board of supervisors, the city and county, which latter is not only itself a consumer, but stands as a representative of the entire body of consumers within the municipality. This principle was involved in the case of *San Diego Land Co.* v. *Jasper* (C. C.), 110 Fed., 702, 712, decided by Judge Ross. In that case the board of supervisors was made defendant, and with it were joined the petitioners upon whose petition, as required by the statute, the board had acted in making the regulation. These petitioners made default and thereupon the complainant contended that the latter were the real parties in interest and that it was entitled *ipso facto* upon their default to a decree against all the defendants. But this relief was denied, the Court saying:

'The answer to the first point is that each and every person to whom the rates fixed apply —in other words, the public—is interested in the question, and the representative of this public in the matter is the board of supervisors, each member of which was by the complainant made a party defendant to the suit, and all of whom appeared to the bill and interposed a defense in behalf of all parties interested. This practice has been uniformly sanctioned and held to be proper.' * * *

"This case went to the Supreme Court (*San Diego Land & Town Company* v. *Jasper,* 189 U. S., 439, 23 Sup. Ct., 571, 47 L. Ed., 892), and that Court, in affirming the decree of the Circuit Court, said: * * *

"Again, in *Railway Company* v. *Minnesota,* 134 U. S., 418, 10 Sup. Ct., 462, 702, 33 L. Ed., 970, Mr. Justice MILLER, in his concurring opinion, discussing a similar question, said: * * *

"See, also, *St. Louis & S. F. R. Co.* v. *Dill,* 156 U. S., 649, 15 Sup. Ct., 484, 39 L. Ed., 567; *Reagan* v. *Trust Co.,* 154 U. S., 362, 14 Sup. Ct., 1047, 38 L. Ed., 1014; *Smyth* v. *Ames,* 169 U. S., 466, 18 Sup. Ct., 418, 42 L. Ed., 819; *San Diego Land & Town Co.* v. *National City,* 174 U. S., 739, 19 Sup. Ct., 84, 43 L. Ed., 1154; *Spring Valley Water Works* v. *San Francisco,* 82 Cal., 286, 22 Pac., 910, 1046, 6 L. R. A., 756, 16 Am. St. Rep., 116. These cases proceed upon the theory that the rights to be protected under the regulating ordinance, and which complainant has assailed, are public rights, and that the only practical way of making the public a party is by suing its representatives; that when this is done the individuals composing the public are, equally with the parties named in the bill, bound by every step properly taken in the action, and may, therefore, be included in and restrained by the injunctive orders of the Court.

"It was upon this principle that Judge MORROW, by his injunction granted in *Spring Valley Water Works* v. *San Francisco* (C. C.), 124 Fed.,

574, an action to declare void an ordinance fixing water rates in the City and County of San Francisco, included the entire body of consumers, restraining the latter, equally with the defendants of record, from in anywise seeking to enfroce the ordinance pending suit. Touching that question, Judge MORROW says:

> 'In this discussion I have not considered the controversy concerning hydrant rates for water supplied to the City, alleged by the complainant to be unreasonably low, nor have I considered the water rates for public buildings paid for by the City. The questions discussed have had relation only to the rights of private consumers, and in this connection the Court at the close of the oral argument suggested a query as to the effect of an injunction upon private consumers directed to the defendants, the Board of Supervisors, or the officers of the municipal corporation. An examination of the authorities submitted by the counsel for the complainant with this question in view has satisfied me that there will be no difficulty in this aspect of the case. The Board of Supervisors, or the municipal corporation, or perhaps both, represent the water rate payers in this controversy, and are bound by the proceedings. This has been established by abundant authority.'

"A like course was followed by Judge MORROW in the more recent case of *San Joaquin, etc., Canal Company* v. *Stanislaus County* (No. 14,554, decided June 29, 1908), 163 Fed., 567, and by Judg GILBERT in *Contra Costa Water Company* v. *City of Oakland* (No. 13,599), 165 Fed., 518, both in this court. And in *Spring Valley Water Company* v. *San Francisco* (No. 14,735, just decided by Judge FARRINGTON), 165 Fed., 667, on motion for an injunction *pendente lite*, the same practice is followed and the consumers are expressly enjoined. These cases would seem to be conclusive of the

question so far as this court is concerned. As against them defendants rely upon *Consolidated Gas Company* v. *Mayer*, above referred to; *Richman* v. *Consolidated Gas Co.*, 114 App. Div., 216, 100 N. Y. Supp., 81; and *Buffalo Gas Co.* v. *City of Buffalo* (C. C.), 156 Fed., 370. The first case was an action to have declared void a rate for illuminating gas in the City of New York. This rate had been fixed, not only by the gas commission—a rate-fixing body established by the Legislature, but the same rate had been established directly by act of the Legislature. The court, as here, had issued a temporary restraining order as a condition for a continuance asked by defendants, prohibiting the officers specially charged with enforcing the rate from taking any step to that end pending litigation; and the motion was for an enlargement of the terms of the restraining order to extend its effect to the consumers. This feature of the motion was denied; the court, while using some general language favorable to defendant's views, very evidently placing its ruling upon the ground that the Legislature having itself fixed the rate sought to be avoided, and there being in such an instance no mode of ascertaining the basis upon which the Legislature had acted, the presumption of the validity of the rate so fixed must obtain until the court could determine, upon final proof and hearing, that it was void, and that in the meantime its enforcement by consumers should not be enjoined. * * *

"A careful review of the whole case makes it clear that it was by reason of the particular circumstances arising from the effect of the acts of the Legislature that Judge LACOMBE was led to hold that the case was outside the rule above indicated as applicable to the ordinary case where, as here, the rate is fixed by a board or commission after a hearing.

"This was very clearly the view taken by the Supreme Court of New York in the second case above cited by defendants, where, passing upon

the same rate, it was expressly held that, the regulation having been fixed by statute, its constitutionality must be presumed until a final judicial determination to the contrary; that until such determination can be had the consumers are entitled to service based thereon; and, further, that the rate fixed by the gas commission must be held as superseded by the act of the Legislature, and in such case the commission cannot be regarded as representing the consumers in a suit involving the validity of such legislative act.

* * * * * * *

"The third case relied upon by defendants—decided by Judge HAZEL, in the Circuit Court for the Western District of New York—is very evidently cited under a misapprehension as to the effect of the ruling there made. The case does not, as supposed by counsel, follow *Consolidated Gas Company* v. *Mayer,* but the learned Judge proceeds to distinguish it, and, in strict accord with the principles of *San Diego, etc.* v. *Jasper,* and the other cases in line therewith, grants the injunction asked. He there says (156 Fed., 371):

> 'Counsel for defendant further contends that neither the City nor the inhabitants can be restrained in this suit under the doctrine announced by Judge LACOMBE in *Consolidated Gas Company* v. *The Mayor, et al.* (C. C.), 146 Fed., 150, and later approved by Judge LAUGHLIN in *Richman* v. *Consolidated Gas Company,* 114 App. Div., 216, 100 N. Y. Supp., 81. In the former case the Court dealt with the provisions of a special act of the Legislature applicable to New York City fixing the price of gas sold to the City at 75 cents per 1,000 cubic feet. For failing to comply with its provisions a penalty is prescribed in the act which the Attorney General or the District Attorney is empowered to collect under section 1962 of the Code of Civil Procedure. For reasons stated in the opinion, the Court, in the *Mayer* case,

declined to enjoin The City of New York. Such reasons, however, are not wholly applicable to this controversy, for here admittedly the City of Buffalo and its Mayor threatens to compel the enforcement of Laws of 1905, page 2100, chapter 739, which provides under section 20 that the Commission, or any person, corporation, or municipality, interested in the enforcement of such order, may apply to the Supreme Court for a writ of mandamus to compel compliance with such order. This Court is therefore persuaded that The City of New York was not enjoined by Judge LACOMBE because in that case the Attorney General and the District Attorney, who were parties, were charged with the responsibility of recovering the specified penalty for non-compliance with the statute, and also because the price of gas to The City of New York was fixed by the Legislature at a less sum than that charged consumers; while in this case the City of Buffalo, in the absence of a contract providing for a less price, probably is liable for an amount equal to that charged the individual consumer. In any event, the action of the Commission declares what shall be the maximum price to consumers of gas, and concededly the City is one of complainant's customers.' "

IV.

The power and responsibility of representing the people of the City of New York who are consumers of the Consolidated Gas Company of New York, in this action, has been imposed on the Corporation Counsel by Section 255 of The Greater New York Charter as amended.

The Greater New York Charter as amended reads in part as follows:

> Section 255.
> "* * * The corporation counsel, except as otherwise herein provided, shall have the right to institute actions in law or equity, and any proceedings provided by the code of civil procedure or by law, in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or any part or portion thereof *or of the people thereof*, * * *"
> (For a complete copy of this section see page 64).

The respondent herein, the Consolidated Gas Company of New York, uses the streets of the City of New York and enjoys the protection of its fire, police, water and other departments and the City of New York levies taxes upon the said respondent corporation herein under provisions of law, and from many points of view of municipal administration is interested in the respondent herein and its operation. The price of gas and its supply or lack of supply for light, heat and power purposes is a matter of serious consideration to the people of the City of New York who are consumers of the respondent, the Consolidated Gas Company of New York, and affects their health, happiness, comfort and convenience.

V.

The power and responsibility of The City of New York of representing the inhabitants of such city who are consumers of the respondent Consolidated Gas Company of New York herein, is also imposed on the Corporation Counsel of The City of New York by Chapter 247 of the Laws of 1913, which amended the General City Law and is known as the Home Rule Bill.

Chapter 247 of the Laws of 1913 grants to the City

> "the power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and proper for carrying such power into execution. No enumeration of powers in this or any other law shall operate to restrict the meaning of this general grant of power or to execute other powers comprehended within this general grant."

Among the specific powers granted to the City by this act are the following:

> "to maintain order, enforce the laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto; and for any of said purposes to regulate and license occupations and businesses."

The term "general welfare" as used in the law just quoted, is defined in Section 21 of said law as follows:

> "§21. *Public or municipal purpose and general welfare defined.* The terms 'public or municipal purpose' and 'general welfare' as used in this article, shall each include the promotion of educa-

tion, art, beauty, charity, amusement, recreation, health, safety, comfort and convenience, and all of the purposes enumerated in the last preceding section."

What affects more the health, safety and comfort of the people of the City than a proper and safe supply of gas, and what promotes more their conveniences and home comforts than such a supply? Under the express provisions of said Chapter 247 of the Laws of 1913, the City must preserve and care for the comfort and general welfare of the people of the City who are consumers of the respondent, the Consolidated Gas Company of New York, and, therefore, must protect and defend them against this attack upon this legislative gas rate fixed by a special city act in their favor at 80 cents per 1,000 cubic feet of gas sold.

VI.

The City of New York is a necessary and proper party to this litigation for the reason that the 75-cent rate for gas fixed for it by Chapter 736 of the Laws of 1905 is necessarily involved therein.

The verified promise of the vice-president of the respondent, the Consolidated Gas Company of New York, that it would not attack the 75-cent rate provided for the City is not conclusive or binding and amounts to nothing more than the personal promise of the affiant. One of the issues necessarily involved in this litigation is the cost of producing and distributing gas. The confiscatory character of this rate may depend upon the 75-cent rate allowed the City of New York. The factors which go to make up the 80-cent rate and the 75-cent rate are so closely related and connected that it is impos-

sible to separate them in this rate litigation and to say which elements going to constitute the rate apply to the 80-cent rate and which apply to the 75-cent rate.

As a result of this litigation the Special Master and the Court will have to make and approve findings of fact as to the cost of manufacturing and distributing gas. Should it be determined that the 80-cent rate charged to consumers generally is confiscatory and that it denies to the Consolidated Gas Company a fair return upon its investment, such a finding will undoubtedly influence not only legislation, but it will also endanger the interests of the City in any litigation which may be brought to test the constitutionality of the 75-cent rate.

Therefore, in order to protect the 75-cent rate in this litigation, the City of New York should be allowed to intervene as a necessary and proper party defendant.

VII.

The order of the District Court denying, as a matter of law, and not in the exercise of discretion, the motion for the City for intervention, is a final order.

In the following cases, and in this Circuit, the rule appears to be settled that an order denying a motion for leave to intervene, as a matter of law, is a final order and is appealable.

Gumbel v. *Pitkin*, 113 U. S., 545;
Houghton v. *Burden*, 228 U. S., 161, 165;
Minot v. *Mastin* (Circuit Court of Appeals, Eighth Circuit), 95 Fed., 734, 739;
United States v. *Philips* (Circuit Court of Appeals, Eighth Circuit), 107 Fed., 824;

Central Trust Co. v. *Chicago, R. I. & P. R. Co.* (Circuit Court of Appeals, Second Circuit), 218 Fed., 336;

Harry Bros. Co. v. *Yaryan Naval Stores Co.* (Circuit Court of Appeals, Fifth Circuit), 219 Fed., 884.

In the *Philips* case (*supra*), which was approved in the *Central Trust Company* case, it was said:

> "This court has held that there are two kinds of interventions. To the one class belong those cases in which the court or chancellor, to whom the application is made, is not bound to permit a third party to intervene, and load the case with collateral issues, and in which the allowance of an intervention is entirely discretionary with the chancellor. To the other class of cases belong those in which the right to intervene is absolute, resting, as it does, upon the grounds of necessity, and the inability of the intervenor to obtain such relief as he is entitled to by any other means than an intervention. *Minot* v. *Mastin,* 37 C. C. A., 234, 95 Fed., 734, 739; *Credits Commutation Co.* v. *U. S.*, 34 C. C. A., 12, 91 Fed., 570, 62 U. S. App., 728, 733. When a chancellor denies leave to intervene, in a case belonging to the first class, no appeal lies, because the action of the chancellor is discretionary; and because the chancellor's action, in denying leave to intervene, is not a final adjudication upon the intervenor's rights. *But, when a chancellor denies the right to intervene in a case belonging to the second class, an appeal lies, because the chancellor's action was not discretionary, and beccause such action was a final adjudication, in that it denied him relief which he could obtain only by an intervention in the pending cause.* Now, in view of the fact that there are two species of intervening complaints and that it may be sometimes difficult to determine to which class the intervention belongs, we think that the

correct practice for the chancellor, after refusing to intervene is to grant an appeal as a *matter of course*, if the intervenor prays for an appeal. When the record is removed to the Appellate Court it can then be determined by that tribunal whether the action of the lower court was purely discretionary, and its judgment not final, or whether the intervenor was entitled to assert his rights by an intervention. Such course of procedure on the part of the chancellor would seem to be necessary, because, if a mistake is made by the lower court as to the character of the intervention, and the chancellor refuses an appeal, the intervenor is entirely without a remedy. In view of these considerations, we think that in the present instance the chancellor should have allowed the appeal and that a motion should have been made in the appellate tribunal to dismiss the appeal. * * * We apprehend that there will be no occasion to issue an alternative writ as we have no doubt that the respondent will allow an appeal in the case when advised of the views of this court."

VIII.

There is a constitutional question involved in this application and its refusal, which the Supreme Court has jurisdiction to review.

This constitutional question consists in:

(1) The refusal of the District Court to allow The City of New York to become a party defendant in this litigation.

(2) The refusal of the District Court to allow the Corporation Counsel to appear for the inhabitants of The City of New York who are consumers of the respondent company, the Consolidated Gas Company of New York.

The Constitution of the United States provides that no man shall be deprived of his property without due process of law. The right of the municipality to appear in this litigation through the Corporation Counsel, and the right of the consumers of the respondent company to appear therein through the Corporation Counsel of The City of New York is a property right, and if this right be denied, such denial is a constitutional question reviewable by the Supreme Court of the United States.

CONCLUSION.

The order appealed from should be reversed and the motion to intervene should be granted.

Dated, New York, September 29, 1919.

Respectfully submitted,

WILLIAM P. BURR,
Corporation Counsel,
Solicitor for Appellant.

JOHN P. O'BRIEN,
VINCENT VICTORY,
of Counsel.

APPENDIX.

Chapter 125 of the Laws of 1906:

"AN ACT in relation to illuminating gas in the City of New York and regulating the quality and pressure thereof and the price to consumers other than said city and providing a penalty for violation.

Became a law, April 3, 1906, with the approval of the Governor. Passed, three-fifths being present.

Accepted by the City.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

"Section 1. A corporation, association, copartnership or person engaged in the business of manufacturing, furnishing or selling illuminating gas in the city of New York, except in the fifth ward of the borough of Queens and in that portion of the borough of the Bronx formerly contained in the towns of Eastchester and Pelham, shall not charge or receive for gas manufactured, furnished or sold in said city a sum per one thousand cubic feet in excess of the following rates:

"1. In the borough of Manhattan, in the first ward of the borough of Queens, in the borough of Brooklyn except the thirtieth and thirty-first wards thereof, and in the borough of the Bronx, except that portion of it formerly contained in the town of Westchester outside of the villages of Wakefield and Williamsbridge, *eighty cents.*

"2. In the second and fourth wards of the borough of Queens, and in the thirtieth ward of the borough of Brooklyn, one dollar.

"3. In the third ward of the borough of Queens, in the thirty-first ward of the borough

of Brooklyn, and in the borough of Richmond, one dollar and twenty-five cents for the remainder of the year nineteen hundred and six; one dollar and twenty cents during the year nineteen hundred and seven; one dollar and fifteen cents during the year nineteen hundred and eight; one dollar and ten cents during the year nineteen hundred and nine; one dollar and five cents during the year nineteen hundred and ten; and one dollar thereafter.

"4. In that portion of the borough of the Bronx formerly contained in the town of Westchester, outside of the villages of Wakefield and Williamsbridge, one dollar and fifteen cents during the years nineteen hundred and six, nineteen hundred and seven and nineteen hundred and eight; one dollar and ten cents during the year nineteen hundred and nine; one dollar and five cents during the year nineteen hundred and ten; and one dollar thereafter.

"§2. The illuminating gas furnished by any such corporation, association, co-partnership or person shall have an illuminating power of not less than twenty-two sperm candles of six to a pound, burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour and each one hundred cubic feet of gas shall not contain more than five grains of ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. The pressure of illuminating gas in any service mains in the said city at any distance from the place of manufacture shall not be less than one inch, nor more than two and one-half inches.

§3. Any corporation, association, co-partnership or person violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to the people of the state.

"§4. This act shall not apply to gas furnished or sold to the City of New York.

"§5. Chapter three hundred and eighty-five of the laws of eighteen hundred and ninety-seven, entitled 'An Act to regulate the price of illuminating gas in cities of fifteen hundred thousand inhabitants,' and all other acts or parts of acts inconsistent herewith are hereby repealed.

"§6. This act shall take effect on the first day of May, nineteen hundred and six."

(Italics are ours.)

Chapter 736 of the Laws of 1905:

"AN ACT in relation to the price of illuminating gas furnished or sold to the City of New York and providing a penalty for violation.

Accepted by the City.

Became a law, June 3, 1905, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. A corporation, association, co-partnership or person engaged in the business of furnishing or selling illuminating gas in the City of New York, shall not charge said city or receive therefrom for such gas, a sum in excess of seventy-five cents per one thousand cubic feet.

§2. The illuminating gas furnished or sold by any such corporation, association, co-partnership or person to said city shall have an illuminating power of not less than twenty-two sperm candles of six to a pound burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming

five cubic feet of gas per hour and each one hundred cubic feet of gas shall not contain more than five grains of ammonia nor more than twenty grains of sulphur nor more than a trace of sulphuretted hydrogen. The pressure of said illuminating gas in any service mains in the said city at any distance from the place of manufacture shall not be less than one inch nor more than two and one-half inches.

§3. Any corporation, association, co-partnership or person violating any provision of this act shall forfeit the sum of one thousand dollars for each offense to be sued for and recovered in the name of and by the City of New York for its benefit.

§4. All acts or parts of acts inconsistent herewith are hereby repealed.

§5. This act shall take effect on the first day of July, nineteen hundred and five.

Article XII, Section 2, of the Constitution of the State of New York:

"§2. Classification of cities; general and special city laws; special city laws; how passed by legislature and acceptance by cities.

All cities are classified according to the latest state enumeration, as from time to time made, as follows: The first class includes all cities having a population of one hundred and seventy-five thousand or more; the second class, all cities having a population of fifty thousand and less than one hundred and seventy-five thousand; the third class, all other cities. *Laws* relating to the *property, affairs* or *government* of cities, and the several departments thereof, are divided into *general* and *special city laws;* general city laws are those which relate to all the cities of one or more classes; special city laws are those which relate to a single city, or to less than all the cities of a

class. *Special city laws shall not be passed except in conformity with the provisions of this section.* After any bill for a special city law, relating to a city, has been passsed by both branches of the Legislature, the house in which it originated shall immediately transmit a certified copy thereof to the mayor of such city, and within fifteen days thereafter the mayor shall return such bill to the house from which it was sent, or if the session of the Legislature at which such bill was passed has terminated, to the Governor, with the mayor's certificate thereon, stating whether the city has or has not accepted the same. *In every city of the first class, the mayor,* and in every other city, the mayor and the legislative body thereof, *concurrently, shall act for such city as to such bill;* but the Legislature may provide for the concurrence of the legislative body in cities of the first class. *The Legislature shall provide for a public notice and opportunity for a public hearing concerning any such bill in every city to which it relates, before action thereon.* Such a bill, if it relates to more than one city, shall be transmitted to the mayor of each city to which it relates, and shall not be deemed accepted unless accepted as herein provided, by every such city. Whenever any such bill is accepted as herein provided, it shall be subject as are other bills, to the action of the Governor. Whenever, during the session at which it was passed, any such bill is returned without the acceptance of the city or cities to which it relates, or within such fifteen days is not returned, it may nevertheless again be passed by both branches of the legislature, and it shall then be subject as are other bills, to the action of the Governor. *In every special city law which has been accepted by the city* or cities to which it relates, *the title shall be followed by the words 'accepted by the city,'* or 'cities,' as the case may be; in every such law which is passed without such acceptance, by the words 'passed *without the acceptance of the city,'* or 'cities,' as the case may be." (Italics ours.)

Section 74 of the Public Service Commissions Law, Chapter 48 of the Consolidated Laws of New York, as amended by the Legislatures of 1918 and 1919:

§74. SUMMARY PROCEEDINGS. Whenever either commission shall be of opinion that a gas corporation, electrical corporation or municipality within its jurisdiction is failing or omitting or about to fail or omit to do anything required of it by law or by order of the commission or is doing anything or about to do anything or permitting anything or about to permit anything to be done, contrary to or in violation of law or of any order of the commission, it shall direct counsel to the commission to commence an action or proceeding in the Supreme Court of the State of New York in the name of the commission for the purpose of having such violations or threatened violations stopped and prevented either by mandamus or injunction. Counsel to the commission shall thereupon begin such action or proceeding by a petition to the Supreme Court alleging the violation complained of and praying for appropriate relief by way of mandamus or injunction. It shall thereupon be the duty of the Court to specify the time not exceeding twenty days after service of a copy of the petition within which the gas corporation, electrical corporation or municipality complained of must answer the petition. In case of default in answer or after answer, the Court shall immediately inquire into the facts and circumstances in such manner as the Court shall direct without other or formal pleadings, and without respect to any technical requirement. Such other persons or corporations, as it shall seem to the Court necessary or proper to join as parties in order to make its order, judgment or write effective, may be joined as parties upon application of counsel to the commission. The final judgment in any such action or proceeding shall either dismiss the action or proceeding or direct that a writ of mandamus or an injunction or

both issue as prayed for in the petition or in such modified or other form as the Court may determine will afford appropriate relief.

Chapter 247 of Laws of New York of 1913, as amended by Chapter 483 of Laws of 1917.

"AN ACT to amend the general city law, in relation to the powers of cities.

Became a law April 10, 1913, with the approval of the Governor. Passed, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Chapter twenty-six of the laws of nineteen hundred and nine, entitled "An act in relation to cities, constituting chapter twenty-one of the consolidated laws," is hereby amended by inserting therein after article two a new article, to be two-a thereof, to read as follows:

ARTICLE 2-A.

POWERS OF CITIES.

§19. **General grant of powers.** Every city is granted power to regulate, manage and control its property and local affairs and is granted all the rights, privileges and jurisdiction necessary and

proper for carrying such power into execution. No enumeration of powers in this or any other law shall operate to restrict the meaning of this general grant of power, or to exclude other powers comprehended within this general grant.

§20. **Grant of specific powers.** Subject to the constitution and general laws of this state, every city is empowered:

1. To contract and be contracted with and to institute, maintain and defend any action or proceeding in any court.

2. To take, purchase, hold and lease real and personal property within and without the limits of the city, and acquire by condemnation real and personal property within the limits of the city, for any public or municipal purpose, and to sell and convey the same, but the rights of a city in and to its water front, ferries, bridges, wharf property, land under water, public landings, wharves, docks, streets, avenues, parks, and all other public places, are hereby declared to be inalienable, except in the cases provided for by subdivision seven of this section.

3. To take by gift, grant, bequest or devise and to hold and administer real and personal property within and without the limits of the city, absolutely or in trust for any public or municipal purpose, upon such terms and conditions as may be prescribed by the grantor or donor and accepted by the city.

4. To levy and collect taxes on real and personal property for any public or municipal purpose.

5. To become indebted for any public or municipal purpose and to issue therefor the obligations of the city, to determine upon the form and the terms and conditions thereof, and to pledge the faith and credit of the city for payment of principal and interest thereof, or to make the same

payable out of or a charge or lien upon specific property or revenues; to pay or compromise claims equitably payable by the city, though not constituting obligations legally binding on it, but it shall have no power to waive the defense of the statute of limitations or to grant extra compensation to any public officer, servant or contractor.

6. To establish and maintain sinking funds for the liquidation of principal and interest of any indebtedness, and to provide for the refunding of any indebtedness other than certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates or revenue bonds are issued or in the taxes for the year next succeeding, and payable out of such taxes.

7. To lay out, establish, construct, maintain, operate, alter and discontinue streets, sewers and drainage systems, water supply systems, and lighting systems, for lighting streets, public buildings and public places, and to lay out, establish, construct, maintain and operate markets, parks, playgrounds and public places, and upon the discontinuance thereof to sell and convey the same.

8. To control and administer the water front and waterawys of the city and to establish, maintain, operate and regulate docks, piers, wharves, warehouses and all adjuncts and facilities for navigation and commerce and for the utilization of the water front and waterways and adjacent property.

9. To establish, construct and maintain, operate, alter and discontinue bridges, tunnels and ferries, and approaches thereto.

10. To grant franchises or rights to use the streets, waters, water front, public ways and public places of the city.

11. To construct and maintain public build-

ings, public works and public improvements, including local improvements, and assess and levy upon the property benefited thereby the cost thereof, in whole or in part.

12. To prevent and extinguish fires and to protect the inhabitants of the city and property within the city from loss or damage by fire or other casualty.

13. To maintain order, enforce the laws, protect property and preserve and care for the safety, health, comfort and general welfare of the inhabitants of the city and visitors thereto; and for any of said purposes to regulate and license occupations and businesses.

14. To create, maintain and administer a system or systems for the enumeration, identification and registration, or either, of the inhabitants of the city and visitors thereto, or such classes thereof as may be deemed advisable.

15. To establish, maintain, manage and administer hospitals, sanitaria, dispensaires, public baths, almshouses, workhouses, reformatories, jails and other charitable and correctional institutions; to relieve, instruct and care for children and poor, sick, infirm, defective, insane or inebriate persons; to provide for the burial of indigent persons; to contribute to and supervise charitable, eleemosynary, correctional or reformatory institutions wholly or partly under private control.

16. To establish and maintain such institutions and instrumentalities for the instruction, enlightenment, improvement, entertainment, recreation and welfare of its inhabitants as it may deem appropriate or necessary for the public interest or advantage.

17. To determine and regulate the number, mode of selection, terms of employment, qualifications, powers and duties and compensation of all

employees of the city and the relations of all officers and employees of the city to each other, to the city and to the inhabitants.

18. To create a municipal civil service; to make rules for the classification of the offices and employments in the city's service, for appointments, promotions and examinations, and for the registration and selection of laborers.

19. To regulate the manner of transacting the city's business and affairs and the reporting of and accounting for all transactions of or concerning the city.

20. To provide methods and provide, manage and administer funds for pensions and annuities for and retirement of city officers and employees.

21. To investigate and inquire into all matters of concern to the city or its inhabitants, and to require and enforce by subpœna the attendance of witnesses at such investigations.

22. To regulate by ordinance any matter within the powers of the city, and to provide for the enforcement of ordinances by legal proceedings, to compel compliance therewith, and by penalties, forfeitures and imprisonment to punish violations thereof.

23. To exercise all powers necessary and proper for carrying into execution the powers granted to the city.

24. To regulate and limit the height and bulk of buildings hereafter erected and to regulate and determine the area of yards, courts and other open spaces, and for said purposes to divide the city into districts. Such regulations shall be uniform for each class of buildings throughout any district, but the regulations in one or more districts may differ from those in other districts. Such regulations shall be designed to secure safety from fire and other dangers and to promote the public health and welfare, including, so far as con-

ditions may permit, provision for adequate light, air and convenience of access, and shall be made with reasonable regard to the character of buildings erected in each district, the value of land and the use to which it may be put, to the end that such regulations may promote public health, safety and welfare and the most desirable use for which the land of each district may be adapted and may tend to conserve the value of buildings and enhance the value of land throughout the city.

25. To regulate and restrict the location of trades and industries and the location of buildings, designed for specified uses, and for said purposes to divide the city into districts and to prescribe for each such district the trades and industries that shall be excluded or subjected to special regulation and the uses for which buildings may not be erected or altered. Such regulations shall be designed to promote the public health, safety and general welfare and shall be made with reasonable consideration, among other things, to the character of the district, its peculiar suitability for particular uses, the conservation of property values and the direction of building development, in accord with a well considered plan.

26. The provisions of subdivisions twenty-four and twenty-five of this act shall not apply to cities of the first class having a population of not less than two hundred and forty thousand and not more than four hundred and fifty thousand.

§21. **Public or municipal purpose and general welfare defined.** The terms "public or municipal purpose," and "general welfare," as used in this article, shall each include the promotion of education, art, beauty, charity, amusement, recreation, health, safety, comfort and convenience, and all of the purposes enumerated in the last preceding section.

§22. **This grant in addition to existing powers.** The powers granted by this article shall be in

addition to and not in substitution for, all the powers, rights, privileges and functions existing in any city pursuant to any other provision of law.

§23. **Powers hereby granted, how to be exercised.** 1. The powers granted by this act are to be exercised by the officer, officers or official body vested with such powers by any other provision of law or ordinance (subject to amendment or repeal of any such ordinance) and in the manner and subject to the conditions prescribed by law or ordinance (subject to amendment or repeal of any such ordinance), but no provision of any special or local law shall operate to defeat or limit in extent the grant of powers contained in this act; and any provision of any special or local law which in any city operates, in terms or in effect, to prevent the exercise or limit the extent of any power granted by this article, shall be superseded. Where any such provision of special or local law is superseded under the provisions of this subdivision, such power, freed from the limitations imposed by such provision, shall be exercised by the same officer, officers or official body that would be vested with the same under the provisions of this subdivision, if such provision had not been superseded, but the exercise thereof shall be subject to the limitations provided for in subdivision two of this section.

2. In the absence of any provision of law or ordinance determining by whom or in what manner or subject to what conditions any power granted by this act shall be exercised, the common council or board of aldermen or corresponding legislative body of the city shall, subject to the provisions of this section, have power by ordinance to determine by whom and in what manner and subject to what conditions said power shall be exercised. The exercise by any city of any power granted by this article not now vested in such city or now vested in such city subject to provisions

which are superseded by the provisions of subdivision one of this section, shall be subject to the following limitations:

a. No city shall issue any obligations for expenses for maintenance, repairs or current operation or administration of the property or government of the city or otherwise than for betterments, improvements and acquisitions of property of a permanent nature, or for the purpose of refunding obligations of the city. No city shall issue obligations until there shall first have been filed in the office of the city clerk a certificate of the comptroller or other chief financial officer of the city under his hand and seal, stating (1) the then existing indebtedness of the city; (2) how much, if any, thereof consist of certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes, and how much, if any, of such certificates or revenue bonds has not been paid out of the taxes for the year when such certificates or revenue bonds were issued for the year next succeeding; (3) the amount of the assessed valuation of the real estate of the city subject to taxation, as shown by the assessment rolls of said city on the last previous assessment for state or county taxes; (4) a description of the property or improvement for the acquisition or making of which the debt is to be created; and (5) the probable life of such property or improvement. Such certificate shall be a public record. The term of payment of any obligations issued to secure such debt shall not exceed the probable life of such property or improvement as stated in such certificate and shall in no case exceed fifty years. This subdivision shall not apply to certificates of indebtedness or revenue bonds issued in anticipation of the collection of taxes for amounts actually contained or to be contained in the taxes for the year when such certificates or revenue bonds are issued and payable out of such taxes. This subdivision shall not apply to certificates of indebtedness or revenue bonds issued in anticipation of the collection of

taxes for amounts to be contained in the taxes for the year next succeeding the year when such certificates or revenue bonds are issued and payable out of such taxes, except that a certificate shall be filed as required by this subdivision before any such certificates or revenue bonds shall be issued.

b. No sale or lease of city real estate or of any franchise belonging to or under the control of the city shall be made or authorized except by vote of three-fourths of all the members of the common council or corresponding legislative body of the city. In case of a proposed sale or lease of real estate or of a franchise, the ordinance must provide for a disposition of the same at public auction to the highest bidder, under proper regulations as to the giving of security and after public notice to be published at least once each week for three weeks in the official paper or papers. A sale or lease of real estate or a franchise shall not be valid or take effect unless made as aforesaid and subsequently approved by a resolution of the board of estimate and apportionment in any city having such a board, and also approved by the mayor. No franchise shall be granted or be operated for a period longer than fifty years. The common council or corresponding legislative body of the city may, however, grant to the owner or lessees of an existing franchise, under which operations are being actually carried on, such additional rights or extensions in the street or streets in which the said franchise exists, upon such terms as the interests of the city may require, with or without any advertisement, as the common council may determine, provided, however, that no such grant shall be operative unless approved by the board of estimate and apportionment in any city having such a board, and also by the mayor.

In any city the question whether any proposed sale or lease of city real estate or of any franchise belonging to or under the control of the city shall be approved, shall, upon a demand being filed, as hereinafter provided, be submitted to the voters

of such city at a general or special election, after public notice to be published at least once each week for three weeks in the official paper or papers. Such demand shall be subscribed and acknowledged by voters of the city equal in number to at least ten per centum of the total number of votes cast in such city at the last preceding general election and shall be filed in the office of the clerk of such city before the adoption of an ordinance or resolution making or authorizing such sale or lease. If such demand is filed, as aforesaid, such sale or lease of real estate or such franchise shall not take effect unless in addition to the foregoing requirements a majority of the electors voting thereon at such election shall vote in the affirmative.

The foregoing limitations shall not apply to the exercise by any city of any power now vested in it, where the existing provisions of law determining by whom or in what manner or subject to what conditions such power shall be exercised are not superseded by the provisions of subdivision one of this section; but in such case the exercise of such power shall be subject only to such existing provisions of law, and shall not be limited or restricted by any provision of this section.

§24. **Construction of this act.** This article shall be construed, not as an act in derogation of the powers of the state, but as one intended to aid the state in the execution of its duties, by providing adequate power of local government for the cities of the state.

§2. This act shall take effect immediately.

Amendment of Executive Law of New York:

"Chap. 442:

AN ACT to amend the executive law, in relation to the duties of the attorney-general in actions involving the constitutionality of a statute.

Became a law May 2, 1913, with the approval

of the Governor. Passed, three-fifths being present.

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Article six of chapter twenty-three of the laws of nineteen hundred and nine, entitled 'An act in relation to executive officers, constituting chapter eighteen of the consolidated laws,' is hereby amended by adding thereto a new section, numbered sixty-eight, to read as follows:

§68. Attorney-general to appear in cases involving the constitutionality of an act of the legislature. Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order directing the party desiring to raise such question to serve notice thereof on the attorney-general, and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute.

§2. This act shall take effect immediately."

Code of Civil Procedure of the State of New York, Chapter XVI, Article Third:

Action for a fine, penalty or forfeiture or upon a forfeited recognizance.

* * * * * * *

"§1962. Action for forfeiture, etc.

Where real or personal property has been forfeited, or a penalty incurred, to the people of the State, or to an officer, for their use, pursuant to a provision of law, the *attorney-general*, or the *district-attorney* of the county in which the action is triable, *must* bring an action to recover the property or penalty, in a court having jurisdiction thereof. Where the supreme court and a justice's court have concurrent jurisdiction of the action, it may be brought to either, at the election of the attorney-general or district-attorney. A recovery in such an action bars a recovery, in any other action, brought for the same cause,"

Section 255 of The Greater New York Charter, being Chapter 378 of the Laws of 1897, as amended by Chapter 466 of the Laws of 1901 and Chapter 602 of the Laws of 1917:

"Corporation Counsel to be the head of the Law Department; Duties; Salary.

§255. There shall be a law department of The City of New York, the head whereof shall be called the corporation counsel, who shall be the attorney and counsel for the city of New York, the mayor, the board of aldermen and each and every officer, board and department of said city, except as otherwise herein provided. The salary of the corporation counsel shall be fifteen thousand dollars a year. The corporation counsel shall have charge and conduct of all the law business of the corporation and its departments and boards, and of all

law business in which the city of New York is interested, except as otherwise herein provided. He shall have charge and conduct of the legal proceedings necessary in opening, widening, altering and closing streets, and in acquiring real estate or interest therein for the city by condemnation proceedings, and the preparation of all leases, deeds, contracts, bonds and other legal papers of the city, or of, or connected with, any department, board or officer thereof, and he shall approve as to form all such contracts, leases, deeds, bonds and other legal papers; provided, however, that he shall not institute any proceeding for acquiring title to real estate by condemnation proceedings, except for opening streets, unless the same shall have been approved by the board of estimate and apportionment upon a statement to be furnished said board of the valuation of such real estate as assessed for purposes of taxation; and provided, further, that the board of estimate and apportionment shall have power by a majority vote to direct such changes to be made in the forms of contracts and specifications as may seem to promote the interests of the city. He shall be the legal adviser of the mayor, the board of aldermen, the presidents of the boroughs and the various departments, boards and officers, except as otherwise herein provided, and it shall be his duty to furnish to the mayor, the board of aldermen, the presidents of the boroughs and to every department, board and officer of the city, all such advice and legal assistance as counsel and attorney in or out of court as may be required by them or either of them, and for that purpose the corporation counsel may assign an assistant or assistants to any department that he shall deem to need the same. No officer, board, or department of the city, unless it be herein otherwise especially provided, shall have or employ any attorney or counsel, except where a judgment or order in an action or proceeding may affect him or them individually or may be followed by a motion to commit for

contempt of court, in which case he or they may employ and be represented by attorney or counsel at his or their expense. The corporation counsel, except as otherwise herein provided, shall have the right to institute actions in law or equity, and any proceedings provided by the code of civil procedure or by law in any court, local, state or national, to maintain, defend and establish the rights, interests, revenues, property, privileges, franchises or demands of the city or of any part or portion thereof, or of the people thereof, or to collect any money, debts, fines or penalties, or to enforce the laws and ordinances. He shall not be empowered to compromise, settle or adjust any rights, claims, demands or causes of action in favor of or against the city of New York, and he shall not permit, offer or confess judgment against the city, or accept any offer of judgment in favor of the city without the previous written approval of the comptroller; provided, however, that this inhibition shall not operate to limit or abridge the discretion of the corporation counsel in regard to the proper conduct of the trial of any action or proceeding, or to deprive such corporation counsel of the powers and privileges ordinarily exercised in the course of litigation by attorneys-at-law when acting for private clients (as amended by L. 1917, ch. 602).

History of the Consolidated Gas Company of New York.

"*History.*—The Consolidated Gas Co. of New York was incorp. Nov. 11, 1884, in N. Y. Companies merged into it were New York Gas Light, Municipal Gas Light, Metropolitan Gas Light, Manhattan Gas Light, Knickerbocker Gas Light and Harlem Gas Light. In December, 1898, a controlling interest in the stock of the New York Mutual Gas Light Co. was acquired. In subsequent years the company acquired control of all the other gas companies and practically all of electric lighting facilities in the Borough of Manhattan, N. Y., as follows: United Electric Light & Power Co. (in 1899), New York Gas & Electric Light, Heat & Power Co., now the New York Edison Company (in 1900), the Standard Gas Light Co. (in June, 1900), New Amsterdam Gas Co. (in 1900), United Electric Light & Power Co. (in 1900), and the Westchester Lighting Co. (in 1904). Owns the entire capital stock of the Astoria Light, Heat and Power Co. of Astoria, L. I. During 1913, the company acquired a majority of the preferred and common stocks of the New York & Queens Electric Light & Power Co. and the entire issue of 6,000 shares of the stock of the New York & Queens Gas Co."

Stock Holdings December 31, 1917, and Percentage of Total Amounts Outstanding.

Consol. Gas Co. Holdings:	Par Value	Per Cent.
N. Y. Edison	$65,953,717	99.98
Astoria L., H. & P.	10,000,000	100.00
N. Y. & Queens Gas	600,000	100.00
N. Y. & Q. El. L. & P.	1,044,000	80.80
Preferred stock	819,800	63.78
N. Y. Mutual Gas Light	1,886,200	54.89
New Amsterdam	12,151,593	99.91
Preferred stock	8,991,475	99.91
Standard Gas Light	4,796,200	96,20
Preferred stock	4,096,100	95.30
United Elec. L. & P.	3,654,145	99.58
Preferred stock	1,641,888	99.58
Westchester Light	10,000,000	100.00
Preferred stock	2,500,000	100.00
Municipal Ltg. Co., Inc.	43,800	.....
New Amsterdam Gas Co.:		
Central Union Gas Co.	3,500,000	100.00
Northern Union Gas	*1,500,000	100.00
New York Edison Co.:		
Cons. Tel. & El. Suby. Co.	†1,869,000	99.71
Brush Elec. Ill. Co.	999,000	100.00

*Includes $760,000 owned by Central Union Gas.

†Includes $200,000 owned by United Electric Light & Power Co.

The Consolidated Gas Co. also held on last accounts $4,818,000 1st Mortgage 5s and $1,000,000 notes of United Electric Light & Power Co., $275,000 Brush Elec. Ill. 5s and $5,000,000 1st Mortgage 5s of Astoria L., H. & Power Co.

Poor's Manual of Public Utilities (1918), p. 1420.

COMPANIES CONTROLLED BY CONSOLIDATED GAS CO.

Astoria Light, Heat & Power Co.—Incorporated Jan. 19, 1899, in New York. On May 10, 1905, absorbed the Citizens Mutual Gas Light Co. of Long Island City (Capital stock, $50,000). * * * (Poor's Manual of Public Utilities, p. 1421).

New Amsterdam Gas Co.—Incorporated Nov. 1, 1897, in New York. Consolidation, March 5, 1898, of the New York and East River Gas Co. and the Equitable Gas Light Co. of New York. Supplies boroughs of Manhattan and Queens, Greater New York, with water gas. Owns and operates in the City of New York, between 135th St. on the north and Canal Street on the south, on both the east and west sides of the City. Also distributes gas in Queens, Long Island City.

Company owns the entire outstanding capital stock of the following companies: New York Carbide and Acetylene Co. ($7,000,000), East River Gas Co. of Long Island City ($1,000,000), Central Union Gas Co. ($3,500,000). Owns also $740,000 of the outstanding $1,500,000 capital stock of the Northern Union Gas Co., the remainder being owned by the Central Union Gas Co. The New York Carbide and Acetylene Co. was acquired as part o fthe property of the consolidating companies on March 4, 1898. It owns patent rights for New York City to manufacture and use carbide. * * * (Poor's Manual of Public Utilities, p. 1422).

Central Union Gas Co.—(Controlled by New Amsterdam Gas Co.)—Incorporated July 13, 1897, in New York. Supplies 23d Ward, Borough of The Bronx, New York, N. Y., with enriched coal gas and water gas. Owns $760,000 of the $1,500,000 capital stock of the Northern Union Gas Co., the remainder being held by the New Amsterdam Gas Co.

Control.—Controlled through ownership of entire capital stock of New Amsterdam Gas Co. * * * (Poor's Manual of Public Utilities, p. 1424).

Northern Union Gas Co. (Controlled by Central Union Gas Co. and New Amsterdam Gas Co.).—Incorporated October 1, 1897, in New York. Supplies 24th Ward, Borough of The Bronx, New York, N. Y., with mixed gas. Owns $25,200 of the capital stock of Wakefield Gas Light Co. (cost on books, $32,500). The Northern Union Gas Co. purchases practically all of its gas from the Central Union Gas Co. * * * (Poor's Manual of Public Utilities, p. 1425).

OTHER COMPANIES CONTROLLED BY THE CONSOLIDATED GAS CO. OF NEW YORK, N. Y.

New York Edison Co. (The)—Incorporated May 1, 1901, in New York, as a consolidation of the New York Gas and Electric Light, Heat and Power Co. and the Edison Electric Illuminating Co. of New York. (For statements of these companies, see Poor's Manual of Railroads for 1900, pages 1077 and 1078). The Consolidated Gas Co. owned the entire capital stock of the former, which, in turn, owned $8,926,500 of the $9,200,000 stock of the Edison Co. The New York Edison Co. supplies the boroughs of Manhattan and The Bronx, New York, N. Y., with electricity. Ownes two large power plants. Practically owns the Mt. Morris Electric Light Co., North River Electric Light and Power Co., Borough of Manhattan Electric Co., New York Light, Heat and Power Co., Block Power and Light Co. No. 1, Yonkers Electric Light and Power Co., Manhattan Lighting Co., Consolidated Telegraph and Electrical Subway Co., Edison Electric Illuminating Co., Manhattan Electric Light Co., Harlem Lighting Co. and Edison Light and Power Installation Co. The company owns nearly all the capi-

tal stock and bonds of the Consolidated Telegraph and Electrical Subway Co., which owns the entire high tension electric wire subway system of the city. Owns also an interest in the Electrical Testing Laboratories Co.

During 1912, the company entered into a 21-year contract with the Third Avenue Railway Co. under which it undertakes to supply the entire requirements of the railway system. This service involves a station capacity of 32,000 kw., or an annual consumption of over 100,000,000 kw. hours. * * * (Poor's Manual of Public Utilities, pp. 1426-1427).

Consolidated Telegraph and Electrical (High Tension) Subway Co. (controlled by New York Edison Co.)—This company is engaged in the construction and leasing of underground ducts or conduits wherein are placed the conductors of companies engaged in the production and use or production and sale of electrical current for light and power delivered over and by high-tension conductors. Operations cover the boroughs of Manhattan and The Bronx. * * * (Poor's Manual of Public Utilities, p. 1430.)

New York Mutual Gas Light Co.—Incorporated April 17, 1866, in New York. Supplies New York City below 63d Street on west side, and below 68th Street on the east side with water gas. Company's charter prohibits it from merging or consolidating with any other gas company. * * * (Poor's Manual of Public Utilities, p. 1431.)

New York and Queens Electric Light and Power Company.—Incorporated July 23, 1900, under the laws of the State of New York, to manufacture and distribute electricity for light, heat and power in the Borough of Queens, City of New York, and also for the adjoining county of Nassau. On July 25, 1900, absorbed by merger the New York and Queens Gas and Electric Co., on July

27, 1900, the Jamaica Electric Light Co. and the Electric Illuminating & Power Co. of Long Island City, and on May 28, 1903, absorbed the Long Island Illuminating Co. Supplies Wards 1, 2, 3 and 4, Borough of Queens, New York, N. Y., with electricity. Under the franchises and contracts, and with the property acquired by the merger above referred to, this company became the sole operating company in the Borough of Queens, except in Ward Five. All franchises are perpetual. Population served, 300,000. * * * (Poor's Manual of Public Utilities, p. 1432.)

New York and Queens Gas Co.—Incorporated July 11, 1904, under the laws of New York. Absorbed Newtown and Flushing Gas Co. Supplies Flushing, College Point, Whitestone and Bayside, N. Y., with water gas. * * * (Poor's Manual of Public Utilities, p. 1433.)

Standard Gas Light Co.—Incorporated January 29, 1886, in New York. Supplies 13th St. north, east and west, to 159th St., New York, N. Y., with illuminating water gas. * * * (Poor's Manual of Public Utilities, p. 1434.)

Westchester Electric Co.—Incorporated November 5, 1900, in New York, to supply gas and electric light. Company absorbed a number of electric lighting and gas companies, described in Ind. Man. for 1911, page 2055. In September, 1908, the company acquired all of the stock ($804,000) and $90,000 first mortgage bonds of the Northern Westchester Lighting Co. and part of the stock ($500,000 common and $75,000 preferred) of the Peekskill Lighting and Railroad Co.

Formerly controlled by the United Gas Improvement Co. of Philadelphia. On July 11, 1904, New York and Westchester Lighting Co. was formed, with a nominal capital of $250,000 and acquired control of the Westchester Lighting Co., issuing its own bonds in exchange

for an equal amount of stock of the latter company. The property was transferred to the Westchester Lighting Co. in October, 1904. Afterwards the Consolidated Gas Co. of New York purchased, through the Westchester Lighting Co., the properties of the New York and Westchester Lighting Co. On October 30, 1904, the Westchester Lighting Co. and the New York and Westchester Lighting Co. were merged. The Consolidated Gas Co at the same time assumed $2,500,000 5 per cent. debenture bonds, issued by the New York and Westchester Lighting Co., and a junior obligation to the general mortgage 4 per cent. bonds of that company. The company supplies gas and electricity to that part of Westchester County north of the northern limits of New York City, to North Tarrytown and Mount Kisco, including Yonkers, Mamaroneck, New Rochelle, Mount Vernon, Port Chester, Harrison, Rye, North Pelham, Pelham Manor, Pelham Heights, Village of Pelham Manor, Village of North Pelham, Village of Pelham, and Town of Kingsbridge. Also has franchises for a large portion of the Borough of The Bronx. Population served, 200,000. Owns six gas plants and seven holders, with a total daily capacity of 11,540,000 cubic feet and three electric stations, with a capacity of 9,435 kw. * * * (Poor's Manual of Public Utilities, p. 1436.)

COMPANIES CONTROLLED BY WESTCHESTER LIGHTING CO.

Northern Westchester Lighting Company (controlled by Westchester Lighting Co.).—Incorporated in May, 1905, in New York, as a consolidation of Northern Westchester Light and Power Co., Ossining Heat, Light and Power Co., and Briarcliff Manor Light and Power Co., and is the owner of the franchises and privileges of the Sing Sing Electric Lighting Co., Sing Sing Gas Mfg. Co., and the Croton Electric Light and Power Co. Supplies Ossining, Croton, Cortlandt, Mt. Pleasant, Briar-

cliff Manor, Sherman Park and Pleasantville, and a portion of Yorktown in Westchester County, N. Y. Population served, about 40,000. * * * (Poor's Manual of Public Utilities, p. 1438.)

Peekskill Lighting and R. R. Co.—Length of track, 10.29 m.; 2d track, 0.35 mile. Gauge, 4 ft. 8½ in. Rail (T), 56 lbs.; girder, 80 to 108 lbs. Motor cars (box, 7; open, 10; semi-convertible, 6), 23; work, 1; coal, 2; combination freight car and snow plow, 1; snow plows, 2; total 29. Power station, 1; engines to generate power, 2.

History.—Incorporated July 12, 1900, under the Laws of New York, as the Peekskill Lighting Co., subsequently purchased the properties of the Peekskill Electric Light and Power Co., the Peekskill Gas Light Co., and the Peekskill Traction Co. (see Manual of Railroads for 1902, page 994). Name changed on August 30, 1900, to the above title. Comprises electric light, power, gas and railroad properties in Peekskill and vicinity. Electric and street railway franchise perpetual; gas franchises liberal. Operates Putnam and Westchester Traction Co. under contract. * * * (Poor's Manual of Public Utilities, page 1439.)

COMPANY OPERATED UNDER CONTRACT BY PEEKSKILL LIGHTING AND R. R. CO.

Putnam and Westchester Traction Co.—Peekskill to Oregon, N. Y., 4.35 miles, of which 1.12 miles on private right-of-way. Rail, 56 to 96 lbs. Gauge, 4 ft. 8½ in.

History.—Chartered July 14, 1906, under the laws of New York. Work on the construction of the road was begun at Peekskill, N. Y., on December 13, 1906, and was completed to Courtlandville, and first car run March 25, 1907. Road operated by the Peekskill Lighting and Railway Co. under contract. * * * (Poor's Manual of Public Utilities, page 1440.)

OTHER COMPANIES CONTROLLED BY CONSOLIDATED GAS CO. OF NEW YORK.

United Electric Light and Power Co. (The).—Incorporated in 1887, in N. Y. as The Safety Electric Light and Power Co. Name changed as above in 1889. The United States Illuminating Co. was merged with this company under date of June 19, 1902. Owns the majority of the capital stock of The Brush Electric Illuminating Co. of New York, and 2,000 shares of stock, $100 par, of the Consolidated Telegraph and Electrical Subway Co. (book value, $50,000), and 1,295 shares of stock ($100 par) of the Ball Electrical Illuminating Co. (book value, $2).

Company in 1914, in conjunction with the New York Edison Co., entered into a contract to supply power for the westerly end of the New York, New Haven and Hartford R. R. and also for the New York, Westchester & Boston Ry. Co. This contract involved the installing of additional generating capacity. * * * (Poor's Manual of Public Utilities, p. 1440.)

Brush Electric Illuminating Co. (controlled by United Electric Light and Power Co.).—Incorporated in 1881, in New York. Supplies electricity in Borough of Manhattan. Franchise perpetual. Operations allowed by franchises in Boroughs of Manhattan and the Bronx. * * * (Poor's Manual of Public Utilities, p. 1441.)